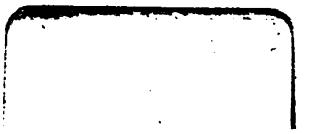

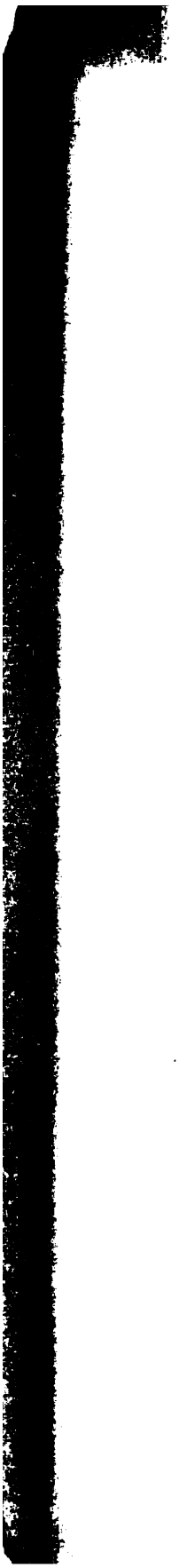

A PRACTICAL TREATISE

ON

THE LAW OF RECEIVERS,

WITH EXTENDED CONSIDERATION OF

RECEIVERS OF CORPORATIONS.

BY

CHARLES FISK BEACH, JR.,

OF THE NEW YORK BAR,

AUTHOR OF TREATISES ON "THE LAW OF CONTRIBUTORY NEGLIGENCE," "MODERN EQUITY JURISPRUDENCE," ETC,, ETC.

SECOND EDITION,

WITH ELABORATE ADDITIONS TO THE TEXT AND NOTES AND MATERIAL CHANGES THEREIN,

BY

WILLIAM A. ALDERSON,

OF THE ST. LOUIS BAR,

AUTHOR OF A TREATISE ON "JUDICIAL WRITS AND PROCESS."

NEW YORK:
BAKER, VOORHIS AND COMPANY.
1897.

DEDICATION OF ORIGINAL EDITION.

TO THE

HONORABLE ROGER A. PRYOR, LL.D.,

FOR MANY YEARS A LEADER AT THE METROPOLITAN BAR,
WHOSE
REPUTATION AS A BRILLIANT ADVOCATE,
EMINENCE AS A LAWYER
AND
CHARACTER AS A BROAD MINDED AND LARGE HEARTED MAN
NEED NO
ILLUMINATION OR ADVERTISEMENT,
THIS BOOK,
IN TESTIMONY OF THE AUTHOR'S ESTEEM AND ADMIRATION,
IS
RESPECTFULLY DEDICATED.

PREFACE TO PRESENT EDITION.

The recent declaration of the supreme court of Georgia that "this is the day of receivers, and their dominion seems to be rapidly extending all over the land," is judicial recognition of the growth and importance of the subject of this treatise.

Since the publication of the work of Mr. Beach upon receivers, nine years ago, this modern subject has been considered, extended and built up in a vast amount of litigation, involving the rights and liabilities of corporations and individuals. This alone is sufficient reason for the publication of a new edition of his valuable work, which has been placed in the libraries of the profession throughout the land.

The publishers gave to the writer the privilege of changing the text and notes and adding thereto in any particular desired. With this authority I have labored for many months to present to the profession a full and comprehensive treatise upon the law of receivers. I have not been satisfied to merely present the decisions of the various courts, but, upon questions as to which courts have disagreed, and concerning many propositions not yet adjudicated, I have indulged in discussion and the expression of my own views.

The merits of the original edition, for which it has been so substantially commended, have been carefully preserved. An estimate of the matter added to the original edition may be had by considering that the pages of the present edition are larger and outnumber those of the first edition by one hundred and forty-four; while a large number of additional cases is cited and considered. Yet, the arrangement of the contents of the book is entirely systematic and harmonious.

It has been the purpose to make the present edition entirely practicable, of value to the experienced and inexperienced practitioner. Special consideration has been given to matters of practice, and attention is particularly called to the final chapter, entirely new, for a statement of the general principles concerning the law of receivers, and the mode of procedure in receivership litigation.

The law concerning receivers of corporations, particularly of rai roads, and receiver's certificates, has received the attention which it importance demands.

The writer gives the result of his labor to the profession with th hope that it may receive no less commendation than has the origin work of Mr. Beach.

WILLIAM A. ALDERSON.

St. Louis, Mo., Security Building, January 1st, 1897.

PREFACE TO ORIGINAL EDITION.

The law of receivers as it is treated herein is largely the growth of the last five and twenty years, and is, moreover, essentially American in its character and characteristics. Mr. High, in the preface to his excellent treatise, sets even a shorter period to the growth of that branch of the general subject which is here particularly considered, and Professor Pollock, acknowledging the receipt of advance sheets of the chapter on Receivers' Certificates, says: "The thing treated of does not exist on this side." I have, therefore, made an American treatise upon an American subject. Because railway receiverships, as incidental to a foreclosure of the mortgages upon railway property and franchises, are, in the main, peculiar to the system of jurisprudence administered in the United States, and, further, because the rules of law in point are, for the most part, of recent development, I have thought that a commentary upon the law of receivers, having particular reference to railway receiverships and written from that point of view of the subject, might find a place in our professional literature, and be useful to that large and growing class of lawyers who have to do with litigation and legal business of this nature, as well as, possibly, in some degree to the bench when questions of this sort are under advisement. That is the apology which I have to offer for the publication of this book. That I have not overestimated the magnitude or importance of the subject appears from a consideration of the fact that, within the past twelve years, no less than three hundred and ninety-two railways, representing nearly forty thousand miles of road, and having a capital stock and bonded indebtedness of more than twenty-three hundred and ten millions of dollars, have been sold in the United States in foreclosure proceedings. These foreclosures involved, in each case, from one to a half score of receiverships, and affected in the aggregate the pecuniary interests of many thousands of persons.

But, while I have, of necessity and because of the nature of the subject, given especial prominence to the law affecting railway receiverships, I believe an examination of the work will show that I

have not overlooked the less weighty matters of the law. The first nine chapters are institutional and general in their character, and I have attempted, in successive chapters, to consider exhaustively the law as it affects receivers of corporations other than railways, receivers of mortgaged property, of realty, of partnerships, in cases of trusts, in judgment creditors' suits, in proceedings supplementary to execution, and the like. There is also a very full treatment of the matter of suits by and against receivers, of sales by receivers, etc., and it will be seen, by a reference to the table of contents, that no topic germane to the subject in hand has been overlooked or slurred over; so that I believe that the statement and illustration of the law of receivers in general is such as to compass fully the whole subject. My purpose has been, while confessedly writing a book upon a branch of the law of railways, to include all the law of receivers, English and American, and to make the treatise complete as far as possible to the date of its publication.

The whole field of case law has been conscientiously canvassed, and I believe that among the three thousand cases that I have collected and cited, will be found every important decision — whether English or American — which has thus far been reported. But here my confidence ends. While the work has been done amid the hurry incident to active practice and the press of many other engagements, I have spared neither pains nor diligence to render it trustworthy and complete. I am not, however, sanguine enough to believe that errors or defects have been entirely avoided, but I hope that, in the judgment of my brethren, they may not seem to outweigh the merits of the book.

In the preparation of several of the chapters I have been materially assisted by the labors of my friend, D. D. Duncan, Esq., of the New York bar, whose industry and discrimination, no less than his learning in the law and skill in legal composition, have contributed essentially to the value of what my book contains.

In declaring that a work upon this subject is in its essence American, I hope not to be understood to undervalue what is known among us as our debt to the Common Law, for I have written in the spirit of that master of the science of English jurisprudence who, in a public lecture lately delivered at Oxford, said: "You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable

so majestic, is this temple of justice not wrought with hands, this immemorial and yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much as one stone thereof and say, the work of my hands is there."

CHARLES F. BEACH, JR.

October 10, 1887.

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THE LAW OF RECEIVERS.

THE LAW OF RECEIVERS.

CHAPTER I.

INTRODUCTORY — RECEIVERS DEFINED — KINDS OF RECEIVERS — OF RECEIVERS GENERALLY — THE NATURE OF THE PROCEEDING

Section 1. Origin and Growth of Receivers.
2. Receiver Defined.
3. Kinds of Receivers.
4. Generally of Receivers — Powers — Effect of Appointment.
5. The Receiver's Function.
6. The Receiver's General Powers and Privileges as an Officer of the Court.
7. Under What Circumstances the Court Will Appoint.
8. The Effect of Appointment of Receivers on Rights of Third Persons.
9. Appointment Discretionary.
10. Of the Nature and Purpose of Receivership Proceedings — In Rem.
11. Further of the Nature of Receivership Proceedings.

Section 1. **Origin and Growth of Receivers.**— The remedy by the appointment of receivers originated exclusively in equity, and is at this time, aside from statutory provisions, administered only by courts of equity, which were first established by the Roman Prætors. But the administration of justice through receivers has been known less than two centuries, and only for a century past has the remedy by appointment of receivers been frequently invoked.

The power to appoint receivers was exercised by the court of chancery of England, where the fundamental principles relative to such power were well established before the independence of the American colonies. In both England and America the administration of justice by the appointment of receivers has been and is considered of as much importance and utility as any power inherent in courts of equity.[1]

The greater number of early English cases concerning receiverships relate to real estate: litigation between mortgagors and mortgagees; and it may be said that the earliest appointments of re-

[1] Skip v. Harwood 1 Atk. 564. "The right to have a receiver appointed is an ancient one." Pelzer v. Hughes, 27 S. C. 408.

ceivers were for the preservation and protection of lands, in which the duty of the receiver was chiefly, if not exclusively, to prevent trespass, to make necessary repairs, and to collect and account for the rents and profits. But as to personal property receivers were, as now, in many respects, invested with the powers of a *curator bonis* of the civil law. They were empowered to take into their possession all things movable, being the subject of the litigation, and if perishable, to sell them. They were directed to collect and sometimes to pay debts.[1]

"The judicial authority to deal with property by means of a receiver is not unlimited or absolute."[2]

So useful and necessary has the remedy through receivers proved to be that resort to it is now of daily occurrence, and has become so frequent as to prompt the declaration: "This is the day of receivers, and their dominion seems to be rapidly extending all over the land."[3]

Section 2. **Receiver Defined.**— A receiver, generally speaking, is one to whom anything is delivered by another. But the use of the word in reference to the subject of which we are to treat means a ministerial officer of a court of chancery, appointed as an impartial and indifferent person between the parties to a suit to take possession of and preserve, *pendente lite*, and for the benefit of the party ultimately entitled to it, the fund or property in litigation, when it does not seem equitable to the court that either party should have possession or control of it.[4]

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[1] Williamson v. Wilson, 1 Bland's Ch. (Md.) 418; Decker v. Gardner, 124 N. Y. 334.

[2] St. Louis, Kennett & Southern Railroad Co. v. Wear, 36 S. W. R. 357.

[3] Hale-Berry Company v. Diamond State Iron Company (Ga.) 22 S. E. R. 217.

[4] Wyatt's Prac. Reg. 335; Chautauqua County Bank v. White, 6 Barb. 584.

Text approved and followed in Harmon v. McMullin, 85 Va. 187. We are now speaking of common-law receivers, who are those having such powers and duties as, in the exercise of their jurisdiction, courts of equity may devolve upon them. Herring v. The New York, Lake Erie & Western Railroad Company, 105 N. Y. 340.

A receiver is not a common-law officer, and his functions have no relation to the title to the exercise of a corporate franchise, which is the sole question in *quo warranto* proceedings. Commonwealth v. Order of Vesta, 156 Pa. St. 531. He is the mere officer or instrument of the court in the preservation of the property. Farmers' Loan and Trust Company. v. Chicago and Alton Railway Co. 42 Fed. R. 6.

A receiver is appointed for the benefit and on behalf of the parties in interest during the pendency of the suit; and, on its termination for the benefit of the party ascertained and adjudged to have the right to the fund or property in controversy. But a stranger whose rights are affected may appear and be heard

The office of receiver is treated as one of confidence and trust, whose powers are conferred and defined by the order of the court.[1] "A receiver is the officer, the executive end, of a court, of equity. His duty is to protect and preserve, for the benefit of the persons ultimately entitled to it, the property over which the court has found it necessary to extend its care. He occupies a fiduciary relation to the owner of the property and all who may have claims to it. He is subject in all things to the direction and control of the court whose officer he is; and when in doubt about his duty in any particular it is his privilege to apply to the court for specific instructions.[2] "The office is in many respects analogous to that of sheriff. He is not a party nor litigant in any suit in which he is appointed, nor can he be made a party on motion, nor obtain a decree nor get a judgment for service or disbursements in such suit."[3]

A court of equity takes possession of property through a receiver who is appointed by and subject to the control of the court.[4]

Section 3. **Kinds of Receivers.**—The original and principal class of receivers is composed of those who are appointed by courts of chancery by virtue of their inherent power, independent of any statute,[5] to exercise such jurisdiction, which receivers derive their

pro interesse suo; and his interests will be protected from diminution by reason of the receivership. Gayle v. Johnson, 80 Ala. 388.

A receiver is appointed for the benefit of all concerned. He is the representative of the court and of all the parties interested in the litigation wherein he was appointed. He is the right arm of the court in exercising its jurisdiction to sequestrate and preserve the *res* of the suit. Henning v. Raymond, 35 Minn. 303. He is not appointed for the benefit only of the party seeking the remedy, and he is not the complainant's agent. First National Bank of Detroit v. Barnum Wire and Iron Works, 60 Mich. 487; State of Florida v. Jacksonville, Pensacola and Mobile R. R. Co. 15 Fla., 201. He is an officer of the court, and his possession of property is that of the court, bringing the property in *custodia legis*. Fowler's Petition, 9 Abb. N. C. 268. (Supreme Court N. Y.)

A receiver, being an officer of the court, is always before it, and is not entitled to notice of proceedings against him. Crawford v. Fickey, 23 S. E. R. 662. "A receiver, as a general rule, is but the agent of the court that appoints him, with authority to take the possession and control of the property, the subject matter of litigation; and is not the representative of its owner for the fulfillment of the latter's contract, except in cases in which he has made the contract his own by some act of adoption." Brown v. Warner, 78 Tex. 543.

[1] Herrick v. Miller, 123 Ind. 304.

[2] Schwartz v. Keystone Oil Co. 153 Pa. St. 283. Receivers "can have general advice and instructions, and, in particular cases, particular advice and instructions on application to the court." Missouri Pacific Railway Co. v. Texas Pacific Railway Co. 31 Fed. R. 862.

[3] Bassick Mining Co. v. Schoolfield, 15 Colo. 376.

[4] Brandt v. Allen, 76 Ia. 50; Turner v. Cross, 83 Tex. 218.

[5] Hegewisch v. Silver, 140 N. Y. 414.

authority from and have their duties prescribed by the order creating the appointment, and are called common-law receivers.[1]

In contrast with such receivers are statutory receivers, who are appointed in pursuance of special statutory provisions, whence they derive their powers, and to which they must look for guidance in performing their duties.

The term *pendente lite* is employed to designate a class of receivers who are also included within the words temporary and provisional;[2] which receivers are appointed before final decree to preserve the property in litigation while the suit is pending; which means the time from its institution to the entry of the final decree.

As distinguished from temporary or provisional receivers is the class called permanent receivers, who are appointed at the time or after the entry of the final decree, and through whom the decree is executed and enforced.

Ancillary or auxiliary receivers are those appointed in a subsequent suit affecting the property of the same defendant, but instituted and pending in another jurisdiction. They are appointed to assist the court of primary jurisdiction, in which the first suit was instituted, in administering justice to the litigants, and are usually, though not necessarily, the same persons appointed by the court wherein the original suit is pending.[3]

For the first time in any book upon the subject of receivers we write the words "friendly receivers," a term which has recently been employed by the profession to designate a class of receivers as to which there has been much controversy and well-founded objection.

A recent article upon "The Evils of Private Corporations" contains a comment upon friendly receivers which may be properly quoted: "These are some of the evils of private corporations, while living as actual, invisible, intangible and soulless persons. * * * When the corporation has been mismanaged, when it has

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[1] Common-law receivers are those having such powers and duties as, in the exercise of their jurisdiction, courts of equity may devolve on them. Herring v. The New York, Lake Erie & Western Railroad Co. 105 N. Y. 340. A common-law receiver has "just such powers as are given him by the order of the court." Henning v. Raymond, 35 Minn. 303; Buckley v. Harrison, 31 N. Y. S. 199.

[2] Wood v. First National Bank of Greenleaf, 41 Kans. 475.

[3] Mr. Justice Brewer has defined an ancillary receiver as being the same person appointed in another court. Stockton v. Reynolds, 140 U. S. 254. But there are numerous cases where different persons were appointed to perform the duties of such receiver.

exhausted its capital stock in its greed to crush out individual enterprise and establish monopoly, it comes serpent-like into court and asks the aid of the court through the instrumentality of a friendly receiver to stay the hands of the creditor until it can work out successfully its fraud in defeating the just demands of its creditors. It is a shame and a disgrace to our judicial system, which countenances the office of the friendly receiver. The rule in such cases is to take some one of the very men who have been instrumental in wrecking the corporation and install him in the office of receiver. * * * The courts too often allow, through this instrumentality, the officers of a corporation to wind up the affairs unmolested when insolvent, when they have shown their inability to manage successfully its affairs when living."[1]

The term "friendly receiver" is most frequently used to designate a receiver of a corporation, who was one of its officers; but the words include every receiver who, by reason of being an officer or stock-holder of a corporation, or because of some connection with and interest in the property and affairs of the defendant, whether a corporation or an individual, is to be presumed to be without that impartiality and indifference necessary to a strictly equitable and just administration of the powers and duties of the office, and subservient to the interests, wishes and direction of the defendant. And this though his integrity be perfect and conceded.[2]

Friendly receivers are not within the requirements thus declared by an eminent jurist in his opinion concerning the appointment of new receivers of the Northern Pacific Railway Company: "They must be men entirely indifferent between contending factions. They must be men that have had no connection with this conflict. They must be men who are strictly impartial, and will perform their duty in single devotion to the trust, and with no ulterior purpose to serve."[3]

Section 4. **Generally of Receivers — Powers — Effect of Appointment.**— Receivers are, as a general rule, mere custodians, having no powers except those conferred by the order of their appointment,[4] but, with the growth of equity jurisdiction, it has be-

[1] T. B. Buckner, Esq., in 1 Kansas City Bar Monthly, 9, 12.

[2] Jenkins, C. J., in Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. Opinion delivered orally and is not reported. See notes, section 33.

[3] Id. Given in full, note, section 33.

As to the matter treated of in this section see sections 33 and 34.

[4] Yeager v. Wallace, 44 Pa. St. 296; Verplank v. The Mercantile Ins. Co. 2 Paige, 453; Hooper v. Winston, 24 Ill. 363; Grant v. City of Davenport, 18 Iowa, 194.

come usual to clothe them with much larger powers than were formerly conferred.[1] A number of the states of the Union have, by statute, conferred enlarged powers upon them for special purposes, the effect being to constitute the officers statutory assignees, having more extensive duties and powers than those of mere custodians, and making them not strictly receivers, though the name is retained.[2]

A court, by appointing a receiver, takes the subject matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceeding and until the final disposal of all questions, legal or equitable, involved in the action. Since the receiver's possession is that of the court appointing him, any attempt to disturb it without leave of the court is a contempt of court, and may be punished accordingly.[3] The purpose of a receivership being to preserve the property contested for, *pendente lite*, it has no effect, of itself, upon the title to such property, either to change it or to create a lien upon it.[4]

The appointment of a receiver determines no right as between the parties, nor does it affect the title to the property in any way.[5] It is not an ultimate determination of the right or title, and, in passing upon the application, the court decides no questions of right involved, nor anticipates its final decision upon the merits.[6] In making an appointment the court is usually careful to consider only the facts necessary to be taken into account for the purposes of the application, and will not go into the merits of the case generally.[7]

The appointment of a receiver will not prevent the running of the statute of limitations. His holding is the holding of the court for him from whom the possession was taken. He is appointed on behalf of all parties, and if any loss arises from deficiency in his accounts the estate must bear it.[8] A plaintiff, acting without fraud,

[1] Davis v. Gray, 16 Wall, 219.

[2] Yeager v. Wallace, 44 Pa. St. 294; Runyon v. The Farmers' & Mechanics' Bank, 3 Green (N. J.) 480; Cooney v. Cooney, 65 Barb. 524.

[3] Beverley v. Brooke, 4 Gratt. 187, 211.

[4] Ellis v. Boston, Hartford & E. Ry. Co. 107 Mass. 1; *Ex parte* Dunn, 8 S. C. 207; *In re* Colvin, 3 Md. Ch. Dec. 278.

[5] Skip v. Harwood, 3 Atkins, 564.

[6] Huguein v. Baseley, 13 Ves. 105; Cooke v. Gwyn, 3 Atk. 689; Ellicott v. Warford, 4 Md. 80; Blakeney v. Dufaur, 15 Beav. 40; Leavitt v. Yates, 4 Edw. Ch. 162; Brown v. Northrup, 15 Abb. Pr. (N. S.) 333; *Ex parte* Walker, 25 Ala. 104; Bitting v. Ten Eyck, 85 Ind. 357; Ellicott v. The U. S. Ins. Co. 7 Gill, 307.

[7] Skinners Co. v. Irish Soc., 1 Mylne. & Cr. 162; Conro v. Gray, 4 How. Pr. 166.

[8] Ellicott v. The U. S. Ins. Co. 7 Gill, 307.

is not liable for damages sustained by property, while in the hands of a receiver appointed at his instance.[1]

Section 5. **The Receiver's Function.**— The receiver being an officer of the court[2] is not to be regarded, in any sense, as the agent or representative of either party to the action.[3] It is his duty to exercise his function in the interest of neither party, but for the common benefit of all the parties concerned.[4] The fund or property is to be regarded as *in custodia legis*,[5] and the receiver as the creature or officer of the court, having only such powers as are expressly conferred upon him by the order of appointment, or such as are conferred upon him by the established rules and usages of a court of chancery.[6]

Although a receiver is an officer to hold property for the benefit of the party ultimately entitled to it, yet when such party is ascer-

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[1] Kaiser v. Kellar, 21 Iowa, 95.

[2] Matter of Burke, 1 Ball & B. 74; Fairfield v. Weston, 2 Sim. & S. 98; Bryan v. Cormick, 1 Cox, 422; Field v. Jones, 11 Ga. 413; Broad v. Wickham, 1 Smith's Chan. Prac. 500; Angel v. Smith, 9 Ves. 335; Curtis v. Leavitt, 1 Abb. Pr. 274; s. c., 10 How. Pr. 481.

[3] "A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. He is not an assignee, and the principles of the common law applicable to assignees do not define or determine the character of a receiver's position or its effect upon the rights of those interested in the property in his possession." New York, Pennsylvania & Ohio Railroad Co. v. New York, Lake Erie & Western Railroad Co. 38 Fed. R. 268; Lottimer v. Lord, 4 E. D. Smith, 183; Davis v. Duke of Marlborough, 2 Swanst. 125.

[4] "A receiver is the officer of the court, the right hand of the court in the management of the trust. It has too often been considered that the receiver is a mere agent of the contesting parties to the suit. He should be in a large sense, if not wholly, indifferent and impartial as between the conflicting interests involved. He should have no object to serve except to conserve the property in the interest of whosoever shall be adjudged to be entitled to it; he should not be concerned in any war of factions, nor interested in favor of, nor opposed to any scheme of reorganization. He should be strictly impartial and solely devoted to the preservation of the property. When he goes beyond that line he oversteps his duty, to the injury of the estate, and in violation of the confidence reposed in him by the court." Jenkins, C. J., in Farmers' Loan and Trust Co. v. Northern Pacific R. Co. Opinion delivered orally and is not reported. See notes, section 33.

[5] Portman v. Mills, 8 L. J. (N. S.) Chan. 161; Delany v. Mansfield, 1 Hogan, 234.

[6] Booth v. Clark, 17 How. 322; Green v. Bostwick, 1 Sandf. (N. Y.) Ch. 185; Skinner v. Maxwell, 66 N. C. 45; 68 Id. 400; Battle v. Davis, 66 Id. 252; Coburn v. Ames, 57 Cal. 201; Hunt v. Wolfe, 2 Daly, 308; Corey v. Long, 43 How. Prac. 497; s. c. 12 Abb. Prac. (N. S.) 427; Devendorf v. Dickinson, 21 How. Prac. 275; Ellicott v. Warford, 4 Md. 80; Hooper v. Winsten, 24 Ill. 353; Kaiser v. Kellar, 21 Iowa, 95.

tained, the receiver is considered as his receiver.[1] He is not appointed for the benefit of strangers to the suit.[2] And where there are conflicting claimants of a trust-fund, who are prosecuting separate suits in the same court, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, will enure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund, and he may have an order in his own suit for the settlement of the receiver's accounts, and a decree against him for the amount found to be in his hands.[3]

A receiver of a corporation is not regarded as a purchaser for a valuable consideration, but as its voluntary assignee and personal representative,[4] and, generally speaking, a receiver should be a person wholly disinterested in the subject-matter of the suit, and he ought not to interfere in any litigation between the parties.[5]

Section 6. **The Receiver's General Powers and Privileges as an Officer of the Court.**—The receiver's powers are those conferred upon him by the order under which he is appointed. He has, in addition to these specified and enumerated powers, such as are conferred upon him by the usage and practice of the court by which he is appointed and for which he acts.[6] These powers, whether expressed or implied and growing out of the practice in chancery, do not extend beyond the jurisdiction of the court appointing the receiver.[7] The appointment of a receiver, moreover, enures to the benefit not only of the party at whose instance the court exercises the jurisdiction, or of the other parties of record in the event of their success in the action, but also of all parties who may at any stage of the proceedings establish a right in, or to the subject-matter of the suit.[8] A receiver is, as between the parties to the suit, to be considered as appointed from the date of the order of reference to the master.[9] And thereafter neither the owner nor any other person can lawfully exercise any act of ownership over the property without the au-

[1] *In re* Colvin, 3 Md. Ch. 278; Ellicott v. Warford, 4 Md. 80.

[2] Howell v. Ripley, 10 Paige, 43.

[3] Beverley v. Brooke, 4 Gratt. 187.

[4] Receivers v. Patterson Gas Light Co. 3 Zabr. 283.

[5] Comyn v. Smith, 1 Hogan, 81.

[6] Chautauqua Co. Bank v. White, 6 Barb. 589; Verplanck v. Mercantile Insurance Co. 2 Paige, 438, 452; 1 Grant's Chan. Prac. (2nd ed.) 298.

[7] Booth v. Clark, 17 How. 322. For the rule as to the power of a receiver to sue in a foreign court, or to exercise his functions beyond the limits of the state where he is appointed, see chapter 20

[8] Delany v. Mansfield, 1 Hogan, 234; Skip v. Harwood, 3 Atkins, 564; *In re* Colvin, 3 Md. Chan. 278; Ellicott v. Warford, 4 Md. 80; Iddings v. Bruin, 4 Sandf. Chan. 417.

[9] Fairfield v. Weston, 2 Sim. & S. 98.

thority of the court,[1] or be held in any way chargeable for the receiver's acts concerning it.[2] The receiver's custody is that of the court, and the rights of the parties to the decree are postponed to be determined by the ultimate decree of the court.[3] Accordingly when a tenant has attorned to a receiver, the court becomes the landlord.[4]

A receiver represents the interests of all the parties in the property, which interests are often various and conflicting and sometimes involved in doubt. It is his duty to protect the property entrusted to him to the best of his ability for all those interested, without being controlled by their representatives or any one of them.[5]

Section 7. **Under What Circumstances the Court Will Appoint.**[6] — The appointment of a receiver rests in the discretion of the court.[7] One of the rules by which courts of equity are governed in Maryland in the appointment of receivers is "that fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved, and that, unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application."[8]

Generally the court will refuse to appoint a receiver where it has no reason to believe that benefit will result from the appointment, or that a refusal will cause an injury, or if it be apparent that the

[1] Id. Bryan v. Cormick, 1 Cox, 422; Wardle v. Lloyd, 2 Moll. 388; Hutchinson v. Lord Bassarene, 2 Ball & B. 55. If receiver, in the discharge of his duty, be threatened with violence, or actual violence be committed upon him, the court will attach the wrongdoer. Fitzpatrick v. Eyre, 1 Hog. 171. As he is the officer of the court, and his possession is but its possession, he is not, according to a decision in Georgia, subject to ordinary process of punishment. Field v. Jones, 11 Ga. 413. Still, where a complaint is made against an officer of the court of chancery for misconduct, while acting under color of authority merely, the court may, either itself take cognizance of the complaint and administer justice between the parties, or may allow the party aggrieved to bring his suit at law for the alleged injury. Parker v. Browning, 8 Paige, 388.

[2] Milwaukee, etc., R. R. Co. v. Soutter, 2 Wall, 510, 519.

[3] Miller v. Bowles, 10 Nat. Bank. Reg. 515. Text approved in Fort Wayne Furnace Co. v. Fort Wayne Coal & Iron Co. 96 Ala. 472.

[4] Angel v. Smith, 9 Vesey, 335.

[5] Iddings v. Bruin, 4 Sandf. Ch. 417.

[6] This title fully treated in chapter 5.

[7] Verplanck v. Caines, 1 Johns (N. Y.), Ch. 57; s. p. Lottimer v. Lord, 4 E. D. Smith (N. Y.), 183; Chicago, etc., Co. v. United States Co., 57 Pa. St. 83. See also Milwaukee, etc., R. R. Co. v. Soutter, 2 Wall, 440, 510.

[8] Haight v. Burr, 19 Md. 130. The appointment is provisional only. Skip v. Harwood, 3 Atkins, 564; Cooke v. Gwyn, Id. 690.

exercise of its power in this respect will cause confusion or difficulty in the management of the property,[1] or if it appear that the appointment will cause a greater injury to the property than if its possession is not disturbed, or if, from other considerations, the appointment will evidently be inexpedient or harmful.[2] In such cases the consent of the parties will not affect the action of the court, more particularly if the rights of others are likely to be adversely influenced.[3] The court is also influenced by the probability whether or not the party making the application will in the end be entitled to a judgment in his favor upon the merits of the case, and, if there be doubt in regard to it, a receiver will be refused.[4]

That the applicant has a full and adequate remedy at law is always good ground for refusing the special remedy of a receivership.[5] Nor will the fact that the pursuit of the legal remedy is difficult,[6] or that the remedy at law has been lost by the laches of the party entitled to such remedy,[7] be sufficient to enable the court to act. There must be some good, affirmative reason for making an appointment. That it will not produce actual harm is clearly insufficient.[8] He who makes application must appear in court with clean hands.[9]

The purpose of the receivership being to preserve the property in controversy from danger of loss or injury until the rights of parties interested in it are determined, it must appear that such danger or

[1] Hamburgh Mfg. Co. v. Edsall, 4 Halst., Ch. 141.

[2] Vose v. Reed, 1 Woods, 647.

[3] Whelpley v. Erie Ry. Co. 6 Blatchf. 271.

[4] Wilkinson v. Dobbie, 12 Blatchf. 298; Owen v. Homan, 3 Mac. & G. 378; s. c. on appeal (affirmed), 4 H. L. Rep. 997, in which Lord Truro said (p. 411): "The granting a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree."

[5] Winkler v. Winkler, 40 Ill. 179; Mullen v. Jenkins, 1 Stockt. 192; Sherman v. Clark, 4 Nev. 138; Coughron v. Swift, 18 Ill. 414; Poage v. Bell, 3 Rand. 586; Webster v. Couch, 6 Rand. 519; Wooden v. Wooden, 2 Green's Ch. 429. See also Parmly v. Tenth Ward Bank, 3 Edw. Ch. 395; Sollory v. Leaver, L. R. 9 Eq. 22; Cremen v. Hawkes, 2 Jones & Lat. 674; Corey v. Long, 43 How. Pr. 497; s. c. 12 Abb. Pr. (N. S.) 427; Opinion of Frick, J., in Speights v. Peters, 9 Gill, 476; Morrison v. Buckner, Hemp. 442; Rice v. St. Paul & Pacific R. Co. 24 Minn. 464.

[6] Cremen v. Hawkes, 2 Jones & Lat. 674.

[7] Brown v. Chase, Walker (Mich.), 43; Kean v. Colt. 1 Halst. Ch. 365; Fogarty v. Bourke, 2 Dru. & War. 580; Gray v. Chaplin, 2 Russ. 126; Skinners' Company v. Irish, Society, 1 Myl. & Cr. 162; Drewry v. Barnes, 3 Russ. 94; Municipal Comrs., etc., v. Lockhart, Ir. Rep. 3 Eq. 515.

[8] Orphan Asylum v. McCartee, Hopk. Ch. 429; Corey v. Long, 43 How. Pr. 498; s. c. 12 Abb. Pr. (N. S.) 427.

[9] Hyde Park Gas Co. v. Kerber, 5 Bradw. 132.

injury is imminent, and not remote or past,[1] and that his own claim of right is reasonably free from doubt.[2]

The right of the plaintiff to the property must be an existing one; if he have parted with his interest, a receiver will be refused without considering his right to the appointment while he had his interest.[3]

Section 8. **The Effect of Appointment of Receivers on Rights of Third Persons.**—It is sometimes necessary to appoint a receiver of property where the interest of the parties to the suit are so connected with those of third persons, that the necessary possession of the officer of the court conflicts with the legal rights of such third persons. But the court never divests a previous possession of such third persons unnecessarily. Even where the receiver is in possession, although the court will not permit him to be interfered with without its consent, such third persons are permitted to come in and be heard in relation to their interests, or they are given leave to bring suit against the receiver to test the question of their rights. And the court will then make such order for the protection of the rights of such third persons, either through the agency of the receiver or otherwise, as may be just and equitable.[4] In case personal property in the receiver's possession is claimed by third persons they may apply to the court, by petition or motion, for an order on him to deliver the property over to them.[5]

Section 9. **Appointment Discretionary.**—It must, however, be borne in mind that all applications for receivers are addressed to the discretion of the court, and that such discretion will be exercised in each case as the facts shown influence the court. It was said by Chancellor Buckner, of Mississippi: "A reference to the various decisions upon motions for the appointment of receivers, shows that each case has been made to depend upon its own peculiar features, and throws but little light upon any new case, except so far as they establish the general principles which should govern the court in the exercise of its discretion upon these motions. These principles are: that the plaintiff must show, first, either that he has a clear

[1] Kean v. Colt, 1 Halst., Ch. 365; Beecher v. Bininger, 7 Blatchf. 170.

[2] Beecher v. Bininger, 7 Blatchf. 170.

[3] Smith v. Wells, 20 How. Pr. 158. For full discussion of subject of this section see chapter 5.

[4] Chancellor Walworth, in Vincent v. Parker, 7 Paige, 65; Howell v. Ripley, 10 Paige, 43; Brooks v. Greathead, 1 Jac. & W. 176; Brien v. Paul, 3 Tenn. Ch. 357; Skinner v. Maxwell, 68 N. C. 400; Angel v. Smith. 9 Ves. 335; Gayle v. Johnson, 80 Ala. 368.

[5] Riggs v. Whitney, 15 Abb. Pr. 389. See further upon this subject chapter 9.

right to the property itself, or that he has some lien upon it; or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim. And, secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant. These are believed to be the general rules governing all applications of this kind."[1]

Section 10. **Of the Nature and Purpose of Receivership Proceedings — In Rem.**—It is frequently of importance to know the nature of receivership proceedings. They always affect and are directed against property, either personal or real, or both. Their purpose is primarily to protect the fund or other property, which is the subject-matter of the suit, from removal, waste or injury during the progress of the litigation, and preserve it for the party ultimately ascertained and declared to be entitled thereto, and for such disposition as the equities of the action require. A receivership proceeding following a final decree is for the purpose of rendering the decree effective, when such can be accomplished only by the seizure of property and administering upon it.

In a recent case the supreme court of Indiana had occasion to consider the subject of this section, and concerning it said: "It seems to be settled beyond dispute, however, that the administration of an estate by a receiver is not purely a proceeding *in rem*, and that the acts of such receiver and the orders of the court in which the estate is administered, do not bind persons who are not parties to the proceeding, and who had no opportunity of being heard."[2]

The supreme court of Minnesota has declared: "The proceeding by receivership is *quasi in rem*, so far as it involves a sequestration of assets."[3]

"The legal fiction of the primary responsibility of property under certain circumstances, is the basis of all proceedings *in rem* It assumes that property, not the owner of the property, is liable to the complainant. It treats of property, therefore, as the defendant, susceptible of being tried and condemned, while the owner merely gets notice, along with the rest of the world, and may appear for his property or not."[4]

[1] Mays v. Rose, Freeman (Miss.), 703. And see also Leavitt v. Yates, 4 Edw. Ch. 162; Beecher v. Bininger, 7 Blatchf, 170.

[2] Dann Manufacturing Co. v. Parkhurst, 125 Ind. 317.

[3] Henning v. Raymond, 35 Minn. 30[illegible]

[4] Waples' Proceedings *In Rem* sec. [illegible]

The author from whom the foregoing quotation is taken also asserts: "Things are indebted when, by operation of law, they become liable for the payment of a sum of money and may be proceeded against without personal citation of the owner as the debtor;"[1] and that "things indebted * * * are condemned to pay some lien resting upon them."[2]

Mr. Justice Miller said of an attachment proceeding: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable * * * to answer any demand which may be established against the defendant. But if there is no appearance of the defendant, and no service of process upon him, the case becomes, in its essential nature, a proceeding *in rem*."[3]

In rem is a technical term of the Roman law, and was and is used to distinguish an action against a thing from one against a person. The terms *in rem* and *in personam* designate two different classes of actions: the one *in rem* being directed against a specific thing, without reference to any particular person, but against all concerned, or, as it is commonly put, against "all the world;" the other *in personam*, being directed against a specific person, the judgment in which is against the person; while in a proceeding *in rem* the judgment only determines the state or condition of the thing. In the latter proceeding process may be served on the thing itself, which is sufficient without personal service to authorize the court to render judgment upon it without personal service on persons, all the world being parties; but in a proceeding *in personam* the court is without power to render judgment affecting the rights of the defendant when there has not been personal service of process on him.[4]

It would seem that in considering and determining the nature of a receivership proceeding it is impossible to wholly separate the proceeding from the suit to which it is incident. The two elements essential to constitute an action *in rem* are, the authority of the court to render judgment without personal service of process on the defendant, and to subject specific property to the payment of a debt or lien. While personal notice of the application for the appointment of a receiver is required as a rule, yet there are circumstances which dispense with the necessity of any notice and authorize the seizure of the property in a proceeding *ex parte*. A proceeding to foreclose a mortgage is purely one *in rem*. The sequestration of the mort-

[1] Waples' Proceedings *In Rem* sec. 1.
[2] Id. sec. 7.
[3] Cooper v. Reynolds, 10 Wall. 308.
[4] Cross v. Armstrong, 44 Ohio St. 618.

gaged property through a receiver for the better protection of the mortgagee would be also a proceeding *in rem.*

Generally speaking, the announcements of the supreme courts of Indiana and Minnesota as above given[1] are to be accepted as correct, and, while receivership proceedings are not strictly *in rem*, they may be properly classed as *quasi in rem.*[2]

Section 11. **Further of the Nature of Receivership Proceedings.**— The remedy by the appointment of receivers is administered exclusively by courts of equity, courts of law having no such power in the absence of statutory authority. The appointment of a receiver is an equitable remedy and bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. Hence the appointment of a receiver has been said to be an equitable execution.[3]

A receivership proceeding has been declared to be a suit of a "local nature" within the meaning of the act of Congress concerning the districts in which certain actions shall be brought.[4] A proceeding seeking the appointment of a receiver and a sequestration of the property of a corporation has been said to be an action for "a distribution of its assets" within the meaning of a code provision requiring the service of papers in such cases to be served on the attorney-general.[5] An order directing a receiver to take possession of property is said to be within the meaning of the phrase "other process" as used in a statute concerning the removal of chattels from real estate.[6]

The appointment of a receiver is not the ultimate end and object of the litigation, but is merely a provisional remedy or auxiliary proceeding.[7] The remedy is incident and ancillary to a pending suit.[8]

The constitution of the State of Nebraska confers on the supreme court jurisdiction in "civil cases" in which the state is a party. It was held that an application for a receiver in the name of the state was a "civil case," within the meaning of the constitution.[9]

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[1] Dann Manufacturing Co. v. Parkhurst, 125 Ind. 317; Henning v. Raymond, 35 Minn. 303.

[2] Bell v. Chicago, St. Louis and New Orleans Railroad Co. 34 La. An. 7.

[3] Cincinnati, Sandusky and Cleveland Railroad Co. v. Sloan, 31 Ohio St. 1; Davis v. Gray, 16 Wall. 203, 218.

[4] East Tennessee, Virginia and Georgia Railroad Co. v. Atlanta and Florida Railroad Co. 49 Fed. R. 608.

[5] Whitney v New York and Atlantic Railroad Co., 32 Hun, 164.

[6] Wood v. McCardell, West & Farrell Carriage Co. 49 N. J. E. 433.

[7] State ex rel. Merriam v. Ross, 122 Mo. 435.

[8] See sec. 51.

[9] State of Nebraska v. Exchange Bank of Milligan, 34 Neb. 198.

CHAPTER II.

OF THE COURTS HAVING POWER TO APPOINT RECEIVERS — THE EXERCISE OF THE JURISDICTION.

Section 12. The Power to Appoint a Receiver is Inherent in a Court of Chancery.
13. The Jurisdiction of United States Courts.
14. The Jurisdiction of State Courts.
15. Power of Appointment in Appellate Courts.
16. Statutory Power to be Exercised by the Officer Designated.
17. Of Appointments in Vacation.
18. Adjudications Concerning the Powers of Certain State Courts.

Section 12. **The Power to Appoint a Receiver is Inherent in a Court of Chancery.**— The appointment of receivers having originated in the court of chancery in England, and experience having proved the wisdom of its exercise, the power of appointment has naturally and regularly descended to all courts which have jurisdiction in equity. It is inherent in courts of equity.[1] In England, upon the abolition of the court of chancery as a distinct court, provision was made for the preservation of the practice and for its enlargement by an enactment that "a *mandamus*, or an injunction, may be granted, or a receiver be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally, or upon such terms and conditions as the court shall think just."[2]

Section 13. **The Jurisdiction of United States Courts.**— The courts of the United States retain and exercise all the chancery powers originally granted to them by the Process Act of 1792,[3] by

[1] Folsom v. Evans, 5 Minn. 418; Skinner v. Maxwell, 66 N. C. 45.

[2] Supreme Court of Judicature Act, (36 and 37 Vict.) ch. 66, sec. 25, § 8. For a construction and instances of the application of this clause, see *In re* Coney, L. R., 29 Ch. D. 993; Stanger Leathes v. Stanger Leathes, Weekly Notes, 1882, p. 71; *In re* Parker. (Deering v. Brooke), 54 L. J. Ch. 694; McGarry v. White, 16 L. R. (Ir.) 322; Hewett v. Murray, 54 L. J. Ch. 572; s. c., 52 L. T. 380; Pease v. Fletcher, 1 Ch. D. 273; Porter v. Lopes, 7 Ch. D. 358; Anglo-Italian Bank v. Davies, 9 Ch. D. 275; Bryant v. Bull, 10 Ch. D. 153; Smith v. Cowell, 6 Q. B. D. 75; Fuggle v. Bland, 11 Q. B. D. 711; Howell v. Dawson, 13 Q. B. D. 67; Hyde v. Warden, L. R. 1 Exch. D. 309.

[3] U. S. Stat. at Large, 276. For the special provisions of the National Banking Act of 1864, by which receivers may be appointed by the Comptroller of the

which the principles, rules and usages of the English court of chancery were adopted in proceedings in equity. Among these powers is that of appointing receivers, a function which is frequently exercised. "The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."[1]

Section 14. **The Jurisdiction of State Courts.**— The powers of the courts of the several states in this respect were originally also in conformity with the English usage, and so continue except where affected by legislation. In a large number of the states these powers have been modified or enlarged, and in those in which courts of chancery have been abolished, they have been conferred upon the courts of general jurisdiction having cognizance of suits which were, before the abolition, of an equitable nature. But the jurisdiction of such courts in the appointment of receivers is distinctly equitable, notwithstanding the effort to unify the forms of actions at law and in equity, and is exercised in conformity with the general principles prevailing in courts of equity. Under the New York code the appointment of receivers is included among the "provisional remedies,"[2] and it has been held that "the provisional remedies are mere incidents to the general jurisdiction of the court, and not an essential part of such jurisdiction, and the legislature has carefully prescribed the cases in which a receiver may be appointed, and other provisional remedies granted, and by specifying the cases in which a receivership may be had, pending the action, and as a proceeding in the action, have as carefully excluded every other case, and prohibited the appointment except as authorized."[3] On the other hand it has been adjudged that the code of North Carolina, which also specifies certain cases in which a receiver may be appointed, "does not materially alter the equitable jurisdiction" of the courts of that state.[4] A court commissioner has no jurisdiction to appoint a receiver.[5] In Georgia it has been decided that a judge *pro hac vice* has jurisdiction to try a case, including an application for a receiver.[6] In Wisconsin it has been held that a county court, having no original jurisdiction of equitable actions, may appoint a receiver,

Currency, for National Banks which refuse to pay their circulating notes, and the decisions thereon see *infra*.

[1] Davis, J., in Payne v. Hook, 7 Wall. 425, 430.

[2] N. Y. Code Civil Proc., § 712.

[3] Fellows v. Heermans, 13 Abb. Pr. (N. S.) 1.

[4] Skinner v. Maxwell, 66 N. C. 45; Battle v. Davis. Id. 252.

[5] Quiggle v. Trumbo, 56 Cal. 626.

[6] Landrum v. Chamberlin, 73 Ga 727.

or employ other equitable remedies, in aid of a suit or a judgment at law, the code of that state having expressly adopted such modes of procedure as a part of the remedy in every civil action.[1]

Section 15. **Power of Appointment in Appellate Courts.**— This power is generally confined to courts having original jurisdiction,[2] and is rarely exercised by those having appellate jurisdiction only;[3] and, when it becomes necessary for such courts to appoint a receiver, in order to enforce their powers as courts of appeal and for the due administration of justice, they must have jurisdiction of the suit by appeal and of the person against whom the remedy is sought.[4]

The United States supreme court has refused an application for the appointment of a receiver, saying, however, that it would not undertake "to decide whether a case may not arise in which we would exercise the power of appointing a receiver pending an appeal to this court."[5]

Section 16. **Statutory Power to be Exercised by the Officer designated.**— Where the statute provided that "receivers can only be appointed by the chancellor," and declared that the register had no power to appoint receivers, an order of the chancellor directing that a receiver be appointed, and referring the matter to the register "to appoint a fit and proper person to be receiver" and to approve his bond, etc., was held by a divided court to be a nullity, and a writ of prohibition was issued;[6] but the chancellor might properly have referred the matter to the register to select and recommend a proper person to be appointed by the chancellor.[7]

Section 17. **Of Appointments in Vacation.**—Under the general rule that where a law authorizes, or contemplates, the doing of an act by a court, it may or must be done by the court in term, and cannot be done by the judge in vacation, an appointment of a receiver by a judge in vacation and the taking and approval of his bond by the clerk in vacation, both of said acts being required by the statute to be done by the court, were held to be void.[8]

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[1] Second Ward Bank v. Upman, 12 Wis. 499.

[2] In Tennessee the appellate court appointed a receiver for the property in controversy in a case pending before it on appeal. West v. Weaver, 3 Heisk. 589.

[3] Text cited and approved in Eastman v. Cain, 63 N. W. R. (Neb.) 123.

[4] Kerr v. White, 7 Baxter, 394; Allen v. Harris, 4 Lea. 190.

[5] Pacific R. R. of Mo. v. Ketchum, 95 U. S. 1.

[6] *Ex parte* Morgan Smith, 23 Ala. 94.

[7] Ibid.

[8] Newman v. Hammond, 46 Ind. 119.

In Indiana, under the code of procedure, the courts have the same power to appoint receivers, and for the same purposes, as pertained to courts of equity prior to the adoption of the code, and by statute they may appoint receivers in vacation.[1]

In Virginia a receivership in a judgment creditor's suit is incidental to an injunction, and as an injunction may be granted in vacation, so, also, a receiver may be appointed in vacation.[2]

The appointment of a receiver in vacation is not specified in the statutes of Illinois prescribing the powers of circuit judges in vacation, and so an order of a state court appointing a receiver over a railway in vacation is a nullity, and the seizure of the property by a receiver subsequently appointed in a federal court is no interference with the state court.[3]

Under the statutes of California a judge at chambers has power to appoint a receiver, and that too upon an *ex parte* application.[4]

The pendency of a plea to the jurisdiction of the court necessarily precludes all further action of the court till it is decided,[5] and pending such plea a receiver will not be appointed; but, in order to guard against the abuse of dilatory pleas, the court will order an immediate hearing or trial of the plea.[6]

Section 18. **Adjudications Concerning the Powers of Certain State Courts — Generally of the Jurisdiction.**— In New York it has been held that the superior court has no authority to appoint a receiver to take the effects and wind up the affairs of a foreign corporation,[7] and that the supreme court, being a court of general jurisdiction, has, by statute, jurisdiction to appoint receivers in cases of insolvent corporations. And when an order is made appointing such an officer, the presumption is that all things were done which were required by the statute to be done, in order to authorize it to make such order;[8] also that an order appointing a receiver under statutes of 1848, ch. 226, may be entered by the justice making it, at any term of the court, in the same manner as other orders.[9]

In Maine the act of 1842, ch. 32, has been declared to be constitutional, and by it the supreme court, sitting in equity, has the

[1] Pressley v. Lamb, 105 Ind. 171; First Nat. Bank v. U. S. Encaustic Co. Id. 227; Bitting v. Ten Eyck, 85 Ind. 357. See the case last cited and Hursh v. Hursh, 99 Ind. 500, as to the practice and procedure.

[2] Smith v. Butcher, 28 Gratt. 144.

[3] Hammock v. Loan and Trust Co. 105 U. S. 77.

[4] Real Estate Associates v. Superior Court, 60 Cal. 223.

[5] Cousins v. Smith, 13 Vesey, 164.

[6] Ewing v. Blight, 3 Wall. Jr. 189.

[7] Day v. United States Car Spring Co. 2 Duer (N. Y.) 608.

[8] Potter v. Merchants Bank, 28 N. Y. 641.

[9] Stewart v. Beebe, 28 Barb. 34.

power to sequestrate the whole assets of an incorporated savings institution, on application of the trustees or a depositor, and place the same in the hands of a receiver, that a just and equitable distribution thereof may be made among all the depositors, according to the amounts due them respectively, whenever such institution shall not have sufficient assets to pay and discharge in full all just and legal claims upon it.[1]

In Missouri the circuit court has inherent power, independent of any statute, to appoint a receiver in settlement of partnership affairs, where there is no statute depriving it of such power.[2]

In Mississippi a circuit judge has no power, under any circumstances, to appoint a receiver in a case pending in the court of chancery, either in vacation or term time.[3]

In North Carolina the superior court of one county will not order the abatement of a nuisance created by a railroad corporation whose property is in the possession of a receiver appointed by the superior court of another county.[4] And in the same state, under the acts of 1877, ch. 223, and 1879, ch. 63, motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding its courts by exchange, at the option of the mover.[5]

"The judicial authority to deal with property by means of a receiver is not unlimited or absolute." [6]

In the case cited there was in controversy the jurisdiction of the state circuit court to appoint a temporary receiver and make the order to show cause returnable in three months, which the supreme court termed a "three months' appointment." The statute of Missouri permits an appeal from an order refusing "to revoke, modify or change an interlocutory order appointing a receiver," and requires the appellate court to summarily hear and determine the appeal. This provision was declared to limit the time for the return of an order appointing a provisional receiver to a reasonable time; and three months were held to be an unreasonable time. The writ of prohibition was awarded against the appointing court.

[1] Savings Institution v. Makin, 23 Me. 360.

[2] Cox v. Volkert, 86 Mo. 505.

[3] Alexander v. Manning, 58 Miss. 634.

[4] Brown v. Carolina Central Ry. Co. 83 N. C. 128.

[5] Corbin v. Berry, 83 N. C. 27.

[6] St. Louis, Kennett & Southern Railroad Co. v. Wear (Mo.), 36 S. W. R. 357.

CHAPTER III.

OF CONFLICTS BETWEEN COURTS IN APPOINTMENT OF RECEIVERS.

Section 19. The Rule as to Courts of Concurrent Jurisdiction When the Property is Wholly Within the Same Territorial Jurisdiction.
20. Further as to the Rule Between Courts of Concurrent Jurisdiction When the Property is Wholly Within Same Territorial Jurisdiction — Identity of Objects of Suits — Exception to the Rule.
21. Conflict in Appointment of Receivers by Courts of Different Territorial Jurisdictions, When Property is Located in Different Jurisdictions — Federal Courts — Conflicts Between.
22. Conflict Between Courts of Same State.
23. Conflict Between Courts of Different States.
24. The Principles of Comity.
25. Conflict Between State and Federal Courts.
26. Conflict Between Assignee in Bankruptcy and Receiver.
27. Conflict in Foreclosure Proceedings.
28. Instances of the Application of the Principle of Comity Between Federal and State Courts.
28a. Of Ancillary Receiverships.

Section 19. **The Rule as to Courts of Concurrent Jurisdiction When the Property is Wholly Within the Same Territorial Jurisdiction.**—In the administration of justice by the appointment of receivers conflicts between courts in the exercise of the jurisdiction are of frequent occurrence, and then arise delicate and important questions as to which of the courts seeking to seize and preserve the property has superior authority and jurisdiction. The topic here presented for consideration principally concerns courts of concurrent jurisdiction in the same territory. The exception includes cases in which the property of corporations, and particularly railroad companies, is located in different territorial jurisdictions, which cases have been numerous of late, and have been productive of much judicial acrimony and serious complications in the federal judiciary, wherein railroad property was the subject of contention.

It is an elementary proposition that, as between courts of concurrent jurisdiction, that one has the exclusive authority to draw the litigation wholly to itself and conduct it to the end, which first had cognizance of the action.[1] But it has been forcibly and plausi-

[1] Conover v. The Mayor, etc., of New York, 25 Barb. 513, 524: "The two courts thus pursuing opposite courses of decision, it is manifestly desirable

bly asserted that receivership proceedings are *quasi in rem*, so far as they involve a sequestration of property and that jurisdiction over the *res* is acquired only by actual seizure; and that as between two actions in different courts of concurrent jurisdiction seizure of the property alone gives superior jurisdiction over it regardless of the time of their commencement and the service of summons.

The leading and most persuasive authority in support of this view of the question is the opinion of Mr. Justice Bradley in the case of Wilmer v. Railroad Company.[1] "The test," the justice said, "I think, is this: not which action was first commenced, not which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. * * * Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and, until it is seized, no matter when the suit was commenced, the court does not have jurisdiction."

This announcement by Mr. Justice Bradley was made in the opinion which he delivered in the case cited upon the application of a receiver appointed by Mr. Justice Woods, then circuit judge, in the same cause; the same question of conflict of jurisdiction between the federal and a state court having been presented and determined by the latter judge in favor of the federal court, which had first taken cognizance of the matter in litigation. The suit in the federal court was first commenced, and process therein first served; but the appointment of the receiver and actual seizure of the property, which was that of a railroad company, were first made by the state court. Under these facts Mr. Justice Woods declared that the jurisdiction of the federal court was superior and exclusive. It was said by him that actual seizure was not necessary to the acquisition of jurisdiction over the property; that one of the main ob-

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that the litigation in one should be suspended, and the whole controversy carried to its conclusion in the action. It is more than desirable, it is indispensable to a reasonable, orderly and decorous administration of justice. How shall this be accomplished? How shall it be decided in which court it shall be continued? And when that is decided, how shall the decision be enforced? Assuming that the two courts have jurisdiction to the same extent, and can administer justice with equal facility and benefit, the rule that the court first having cognizance of the subject shall retain it and draw the litigation wholly to itself, seems to be properly applicable. It is perfectly free from odium, is consistent with the fullest comity and the most delicate respect for the other tribunal. If there be no reason in the constitution of the courts why one is more competent, under all the circumstances existing or likely to arise, to assume the whole of this controversy and conduct it to an issue than the other, priority in acquiring possession of the case may with propriety be allowed to determine in which it shall proceed.

[1] 2 Woods, 426.

jects of the suit was to obtain possession of the property, which was necessary to the full relief prayed for, and that the institution of the suit and the service of process gave jurisdiction over the property. "An examination of the case cited," he said, "will show that actual seizure of property has not been considered necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought. The commencement of the action and service of process; or, according to some of the cases, the simple commencement of the suit by the filing of the bill is sufficient to give the court jurisdiction, to the exclusion of all other courts."[1]

It was when passing upon the application of the receiver appointed by Judge Woods for the possession of that part of the railroad property located in Georgia that Mr. Justice Bradley delivered the opinion from which we have quoted. He further said: "It is too well settled to admit of controversy, that where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suit are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases. * * * In differing from Judge Woods we do so with respect for his opinion. The question must be admitted to be one of some nicety, but we prefer that course which avoids collision with a state court, when it coincides with our own convictions as to the law."[2]

The United States circuit court of appeals, fifth district, has recently considered and commented upon the opinions of Woods, C. J., and Mr. Justice Bradley in the case of Wilmer v. The Atlanta & Richmond Air Line Railway Co., *supra*, approving and fol-

[1] Wilmer v. The Atlanta and Richmond Air Line Railway Co. 2 Woods, 409. The feature of the suit before Judge Woods was the application of mortgage bondholders for the appointment of a receiver, it being objected that a state court had already taken possession of the railroad property through a receiver. But the application was granted and a receiver appointed. Afterwards the receiver applied to Mr. Justice Bradley for the possession of that part of the line located in the northern district of Georgia; and in that proceeding it was again contended, in resisting the application, that the property was in possession of a state court, which had first seized it, but in a suit commenced subsequent to the one instituted in the federal court.

[2] Erskine, D. J., concurring.

In the case of East Tennessee, Virginia & Georgia Railroad Company v. Atlanta and Florida Railroad Co., 49 Fed. R. 608, the opinion of Mr. Justice Bradley in the Wilmer case is approved and followed. Same rule announced and followed in Bell v. Ohio Life & Trust Co. 1 Biss. 260.

lowing that of the former, and declaring that filing the bill and service of process is an equitable levy on the property, and gives the court superior jurisdiction over it, and that the authority of the court to seize property through a receiver is not affected by a subsequent suit, though a receiver therein be first appointed.[1]

The rule now prevailing in both federal and state courts is correctly and fully stated in the quotation given in the preceding note from the opinion of the United States circuit court of appeals in the case of Illinois Steel Co. v. Putnam, and is this: The commencement of a suit, the object of which is to have certain property sequestered and administered for the benefit of all having an interest therein, and the possession and control of which are necessary to grant the full relief prayed for, constitutes an equitable levy, and pending the suit such property is *in gremio legis* — and the court whose jurisdiction is first invoked, whether state or federal, has the exclusive right to seize and administer the property over another court of concurrent jurisdiction in which a subsequent suit is commenced, though a receiver be first appointed therein and actually takes possession of the property.[2]

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[1] Adams v. Mercantile Trust Co., 66 Fed. R. 621. Pardee and McCormick, C. JJ., Bruce D. J.

The same court and the same judges approved and followed the rule announced in the Wilmer case by Woods, C. J., in the case of Illinois Steel Co. v. Putnam, 68 Fed. R. 515, in which this was said: "Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or of either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceeding such property may properly be held to be *in gremio legis*. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court whose jurisdiction is invoked the exclusive right to control the property."

[2] The rule is founded not only on comity—mere curtesy, but on utility and principles of sound policy. Dillon v. Oregon Short Line and Utah Northern Railway Co. 66 Fed. R. 1622.

The rule as given in the text is supported by the following authorities: State ex rel. Merriam v. Ross, 122 Mo. 435; Judd v. Bankers and Merchants' Telegraph Co., 31 Fed. R. 182; S. C., 24 Blatchf. 420; Thompson v. Hollady, 15 Oreg. 34; Union Trust Co. v. Rockford, Rock Island & St. Louis Railroad Co., 6 Biss. 197; Gaylord v. Fort Wayne, M. & C Railroad Co. 6 Biss. 286; May v. Printup, 59 Ga. 129; People v. Central City Bank, 53 Barb. 412; Alabama & Chattanooga Railroad Co. v. Jones, 7 Nat'l. Bank R. 145, 170; Illinois Steel Co. v. Putnam, 68 Fed. R. 515; Pound, *in re.*, 42 Ch. D. 402.

Where two persons were on the same day appointed receivers of an insolvent bank by different justices, it was held

The phrase "commencement of a suit," as above used, means a legal commencement according to the law of the forum, which may or may not require the issuing or service of process.[1]

It has been said that a receiver may be appointed over property already in the possession of a receiver appointed by another court, but wholly subject to the rights and powers of the latter receiver.[2] Where for any reason a court appoints a receiver over property already in the possession of a receiver, the same person should receive the appointment.[3]

Section 20. **Further As to The Rule Between Courts of Concurrent Jurisdiction When The Property is Wholly Within**

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that both could not act, and that the question which of them was entitled to the assets of the bank must be determined as a legal right, and depended on the priority of judicial action on the petitions for the appointment of a receiver, without regard to the time of the verification of the papers, or the time of actually getting possession of the assets. People v. Central City Bank, 53 Barb. 412.

"The court which takes cognizance of the controversy is entitled to general jurisdiction to the end of the litigation, and, incidentally, to take possession and control of the subject-matter of the suit to the exclusion of all interference of other courts of concurrent jurisdiction. The principle grows out of a spirit of comity, which has the highest aim for the public good and without the observance of which conflicts of a serious nature would be likely to arise. Co-ordinate authority emanating from our state and federal governments, administered by their respective tribunals, can be exercised harmoniously only by conceding to the tribunal which first obtains jurisdiction over the thing, the right to the exercise of it." Thompson v. Hollady, 15 Oreg. 34.

In Union Trust Co. v. Rockford, Rock Island & St. Louis Railroad Co., 6 Biss. 197, Judge Blodgett said: "The history of the jurisprudence of this country shows the most commendable disposition on the part of both federal and state courts not to infringe upon each others jurisdiction. * * * It is and has long been the settled rule of law in all cases of conflict of jurisdiction, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res* or subject-matter of the dispute to the exclusion of all interference from other courts of co-ordinate jurisdiction." And in the same case this was said: "The proper application of the rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure; for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property, and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit unavailing. To avoid such a result the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained."

[1] Alderson on Judicial Writs and Process, sec. 10.

[2] Bailey v. Belmont, 10 Abb. Pr., N. S. 270.

[3] Foerstee v. Squire, 19 N. Y. S. 867.

Same Territorial Jurisdiction — Identity of Object of Suits — Exceptions to the Rule.— In the case of Wilmer v. The Atlanta and Richmond Air Line Railway Co.[1] Mr. Justice Bradley said: "It is too well settled to admit of controversy, that where two courts have concurrent jurisdiction of a subject of controversy the court which first assumes jurisdiction has it exclusive of the other." Then the justice announced these significant and important words: "But where the objects of the suit are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases."

The justice assigned as one of the reasons for this conclusion in the case the fact that the object of the suit in the federal court and that of the suit in the state court were not the same. The assertion by the justice constitutes a clear exception to the rule, as to the reason and correctness of which we wish to inquire.

In the case of Illinois Steel Company v. Putnam,[2] to which we have called attention in the preceding section, the United States circuit court of appeals recognized and clearly announced the rule to be as we have put it in the preceding section: that it is the commencement of the suit, not the actual seizure of the property, that gives superior jurisdiction; but the court asserted and held that the rule did not apply when the suit was a mere "stockholders' bill," seeking only to secure the better management of the property.[3]

In the case of East Tennessee and Georgia Railroad Company v. Atlanta and Florida Railroad Company[4] the court was influenced in its opinion because the suit before it was instituted by creditors for a large amount, who insisted earnestly on the payment of their claims, while the bill first filed in the state court asking for the appointment of a receiver of the same property was "an amicable proceeding with no immediate purpose of asking for the appointment of a receiver." It was said that the doctrine of comity would not be

[1] 2 Woods, 426.

[2] 68 Fed. R. 515.

[3] The opinion rendered in this case justifies citing it as supporting the exception to the rule under consideration, but the facts are that only one suit had been instituted and was pending: the controversy arising by reason of an action by the receiver, appointed in a proceeding by stockholders seeking the better managment of the company's affairs, against the Illinois Steel Company for railroad material which had been sold by it to the former, and by the latter returned by the steel company before the appointment of the receiver.

[4] 49 Fed. R., 608. In this case the suit in the state court was commenced first, but the appointment of the receiver was made first by the federal court.

applied because the proceeding in the state court was at the instance of a portion of the creditors for the purpose of "standing off" other creditors.

The United States circuit court of appeals, in another district, in the case of Liggett v. Glenn,[1] said expressly that "the general doctrine that, in courts of concurrent jurisdiction, the jurisdiction of the court first taking control of the property involved is exclusive," could not be successfully invoked when one of the suits was instituted by a stockholder and the other by a creditor of the corporation.

In a recent case Mr. Justice Brewer said: "For the purpose of this case it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action; an exigency may arise which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action."[2]

The United States circuit court of appeals, sixth district, has declared that where there is a conflict of jurisdiction it is manifest that there can be constructive possession by one court where it does

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[1] 2 U. S. Cir. C. App. 246; s. c., 51 Fed. R. 381.

[2] Shields v. Coleman, 157 U. S. 168; s. c., 15 S. C. R. 570. In this case the federal court had first appointed a receiver, but had discharged him and returned the property to the insolvent, on bond being given. Held, that the property then became free for the action of any other court of competent jurisdiction; that the mere continuance of the suit did not operate to prevent any other court from touching the property, although the United States court had the power to thereafter set aside its order accepting security in place of the property, and enter a new order for possession of the property by a receiver, that such new order would not relate back to the filing of the bill so as to invalidate action taken by another court in the meantime.

not take actual possession; but that it by no means follows that such constructive possession will exclude the taking of actual possession of the property by another court. And it was held that the prior institution and pendency in a state court of a proceeding *in rem* to enforce a lien which did not involve the actual seizure of the property, did not prevent the federal court, in a proceeding by bondholders to foreclose the mortgage, appointing a receiver and taking possession of the property.[1]

It is apparent from the foregoing cases, as well as the reason attending the rule announced in the preceding section, that Mr. Justice Bradley correctly asserted in the Wilmer case[2] that, "where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases." But the announcement of the exception is more easily made than its application.

Certainly the rule is applicable only where the actual seizure and control of the property are essential to granting the full relief prayed for in the suit first commenced, and not merely incidental thereto; for only under the former condition does the jurisdiction of the court relate back to the commencement of the suit.

But the appointment of receivers and the seizure of property are not always for the accomplishment of the same object. A stockholder's bill, seeking only to correct abuses in the management of the affairs of a corporation, is not as serious and far-reaching as a bill by bondholders to foreclose a mortgage on the company's property. A creditor's bill necessitating the possession and control of the property and business of the defendant, is not as comprehensive and effective as a proceeding by the government to dissolve and wind up the affairs of a corporation.

The question is attended by the condition of both prior and higher right. The commencement of a proceeding to enforce a lien which is subject to a mortgage, cannot and does not preclude the institution and consummation of a proceeding by the bondholders to foreclose the mortgage. In such case complications may be and have been avoided by appointing the same person receiver in both suits.[3] Nor can the seizure and possession of property of a

[1] Compton v. Jesup, 68 Fed. R. 263. In Merchants & Planters' National Bank v. Trustees of Masonic Hall, 63 Ga. 549, on application of a judgment creditor the state court appointed a receiver while a similar application by a stockholder of the defendant was pending in the federal court, the judgment creditor not being made a party.

[2] Wilmer v. The Atlanta and Richmond Air Line Railway Co. 2 Woods, 426.

[3] Lloyd v. Chesapeake, Ohio and Southwestern Railroad Co. 65 Fed. 851;

corporation through a receiver appointed in a proceeding by a stockholder or creditor, preclude the court having cognizance of a proceeding by the state to dissolve and wind up the affairs of the corporation from appointing a receiver and taking possession of the property of the defendant.[1] And this both because of higher right and the fact that the objects of the suits are not the same.

To avoid the application of the rule and to be within the exception, the suits must be different either in their objects and in the rights sought to be enforced.

Section 21. **Conflict in Appointment of Receivers by Courts of Different Territorial Jurisdictions Where Property is Located — Railroad Property — Federal Courts — Conflicts Between.** — The topic of which this section treats relates more particularly to the appointment of receivers by federal courts of railroad prop-

St. Louis Car Co. v. Stillwater Street Railway Co. 53 Minn., 129; State of Florida v. Jacksonville, Pensacola & Mobile Railroad Co. 15 Fla. 201; Compton v. Jesup, 68 Fed. R. 263.

[1] State v. Port Royal & Augusta Railway Co. (Sup. Ct. S. C.), 23 S. E. R. 383; Herring v. New York, Lake Erie & Western Railroad Co. 105 N. Y. 340; In re Kittanning Insurance Co. 146 Pa. St. 102. It has been held that the appointment of a receiver in a suit to foreclose a mortgage on property of a corporation will not prevent another receiver under statutory proceedings from sequestrating all the property and effects of the corporation for the benefit of all its creditors; first receivership being only to foreclose the mortgage, and the second having for its purpose to sequestrate all the property of the corporation for the benefit of all its creditors. The powers of the receivers in the two cases are entirely different. The appointment of the statutory receiver does not necessarily supersede the other. Both receivers may be continued if the court deems such advisable, the statutory receiver being subordinate to the mortgage receiver. Held, that it would be "eminently desirable" that the entire property should be under the control of one officer of the court, and suggested the propriety of appointing the same person receiver in both cases where there was no conflict of interest. St. Louis Car Co. v. Stillwater Street Railway Co. 53 Minn. 129.

See also City Water Co. v. State of Texas, 32 S. W. R. 1033; Texas Trunk Railway Co. v. State of Texas, 83 Tex. 1, in which there was in controversy the power of the state court to appoint a receiver of a railroad in *quo warranto* proceedings, the federal court having already appointed a receiver of the property in foreclosure proceedings. But the question was not determined.

In re Pound 42 Ch. D. 402, it was held by the trial court that a receiver appointed in pursuance of provisions of a deed of trust securing debentures could not retain possession of the property over a receiver subsequently appointed on petition for the dissolution and winding up of the affairs of the company; the receiver in the latter proceeding being termed the "official receiver" or "liquidator." But this decision was reversed on appeal, it being declared by Cotton, L. J., that the debenture-holders had the right under the deed of trust, to the appointment of a receiver, and that the winding-up proceeding could not interfere with the right of the receiver of the bond-holders to take possession of the property.

erty located in different judicial districts, which has been a subject of much difficulty and the cause of many complications; and while it concerns the rule discussed in the two preceding sections it has the additional element of requiring the ascertainment which court has primary jurisdiction, and is founded to a greater extent on the rule of mere comity. As to this subject Judge Jenkins, of the federal court, in speaking of the difficulties attending the recent conflict between the federal courts over the appointment of receivers of the Northern Pacific Railroad Company, has said to us: "It all resolves itself to this: whether and when the rule of comity is imperative. I think that the natural outcome of it will be that Congress must intervene, and by statute regulate the question."

The Wabash and Northern Pacific Railroad cases have given occasion for consideration and determination of the question presented, and a brief review of those cases will be a sufficient statement of the doctrine governing the subject that has been and is now recognized and accepted by the federal courts.

The Wabash, St. Louis and Pacific Railway Company owned and operated lines of railroad east and west of the Mississippi River. On petition presented by the company to the United States circuit court at St. Louis, setting forth its insolvent and serious condition, Mr. Justice Brewer, then a circuit judge, appointed Solon Humphreys and Thomas E. Tutt receivers of the entire Wabash system, who took possession of and operated it for several years. The company also filed a similar bill in the circuit court for the northern district of Illinois, which court approved the orders made at St. Louis and appointed the same persons receivers, but reserving "to itself power to make such further orders in the premises as may seem to be necessary."

Two years afterward the holders of bonds secured by mortgage on a portion of the lines located in Illinois commenced foreclosure proceedings in the federal court there, in which it was contended that the circuit court for the eastern district of Missouri, in which the receivers were originally appointed, was the court of primary jurisdiction with power to possess and control the entire system, and that to it alone could the bondholders apply for the protection of their claims. This contention was denied by Judge Gresham with some emphasis, and he entertained the bill, granted the relief sought and appointed Judge Cooley receiver and ordered him to take possession of the company's property located in Illinois.[1]

[1] Atkins v. Wabash, St. Louis & Pacific Railway Co. 29 Fed. R. 161. Judge Gresham declared that the federal court of Missouri did not acquire "the legal

Messrs. Humphrey and Tutt then applied to the court in Missouri for instructions as to their power and duties over the part of the Wabash system placed by Judge Gresham in the possession of Judge Cooley, and Judge Brewer ordered them to relinquish control of that part of the road east of the Mississippi river, but expressing disapproval of the action of Judge Gresham, asserting that the circuit court for the eastern district of Missouri had primary jurisdiction over the entire Wabash system, and that the proceeding in Illinois was only ancillary.[1]

The Northern Pacific Railroad case has been productive of serious conflict between the federal courts for the eastern district of Wisconsin and the district of Washington. In proceedings directed against the Northern Pacific Railroad, filed in the circuit court for the eastern district of Wisconsin, Judge Jenkins appointed receivers for the entire system, who qualified, took possession of the property and proceeded and continued to operate it for several years. The importance of this litigation upon the question of conflict of jurisdiction between federal courts in appointing receivers of rail-

custody of the *res*, the entire Wabash property," that its jurisdiction was not paramount, and that the plaintiffs would not have to apply to the court at St. Louis for redress. "The rule in this country," he said, "is that receivers appointed by one jurisdiction are not entitled, as a right, to recognition in other jurisdictions; and that courts of equity cannot acquire extra territorial jurisdiction over property by appointing receivers."

[1] Central Trust Company of New York v. Wabash, St. Louis & Pacific Railway Co. 29 Fed. R. 618. The views of Judge Brewer were thus expressed: "Proceedings were commenced in this court as a court of primary jurisdiction, and receivers were appointed by this court. Of the propriety of a foreclosure in one court operating upon the entire property running through several states, and of the validity of a sale made in pursuance of that foreclosure, and the completeness of the title which will pass by such sale, there can be now no longer a question. Muller v. Dows, 94 U. S. 444. * * * In the early history of foreclosure proceedings of this nature it became customary, not merely that foreclosure proceedings should be conducted in the one court, but that, to avoid all questions of title, ancillary proceedings should be conducted in the courts of other circuits; and to conserve the property pending the foreclosure — to guard it against local suits, and preserve it from dismemberment — the custom has also been for the receivers appointed in the court of primary administration to be also appointed in the courts of ancillary administration."

Same rule announced in following cases: Continental Trust Co. of New York v. Toledo, St. Louis and Kansas City Railroad Co. 59 Fed. R. 514; New York, Pennsylvania and Ohio Railroad Co. v. New York, Lake Erie & Western Railroad Co. 58 Fed. R. 268; Dillon v. Oregon Short Line & Utah Northern Railway Co. 66 Fed. R. 622; Ames v. Union Pacific Railroad Co. 60 Fed. R. 966; Clyde v. Richmond and Danville Railroad Co. 56 Fed. R. 539; Central Trust Co. of New York v. East Tennessee, Virginia & Georgia Railroad Co. 30 Fed. R. 895.

road property is such as to call for an extended statement of the facts attending it, which we give in note.[1]

[1] The history of the Northern Pacific Railroad litigation, as it concerns the present discussion, is as follows: On the 15th day of August, 1893, Winston and Sheldon, stockholders, and the Farmers' Loan and Trust Company, mortgage trustee, filed their bill of complaint in the circuit court of the United States for the eastern district of Wisconsin against the Northern Pacific Railroad Company, a corporation created under the act of congress to construct a railroad from Ashland in the State of Wisconsin, to Tacoma in the State of Washington, and Portland in the State of Oregon. Ashland, Wisconsin, is in the western district of Wisconsin. It was alleged in the bill, as the fact was, that the Northern Pacific Railroad Company had leased from the Wisconsin Central Company the Wisconsin lines connecting the main line of the Northern Pacific at Ashland with the southerly state line of Wisconsin, and through the eastern district, and there connecting with the Chicago and Northern Pacific Railroad, running into Chicago. This lease was for ninety-nine years. The bill showed the insolvency of the company. The defendant in the bill appeared generally by counsel, and by consent of all parties three receivers were appointed. Ancilliary bills were immediately filed in the federal courts in New York, Chicago, the western district of Wisconsin, Minnesota, North Dakota, Montana, Washington, Oregon and Idaho.

On the 18th of October, 1893, the Farmers' Loan and Trust Company, trustee, filed in the circuit court for the eastern district of Wisconsin its bill to foreclose the second and third consolidated general mortgages. To this bill the Northern Pacific Company entered its general appearance, and the circuit court reappointed in the foreclosure suit the receivers formerly appointed in the creditors' suit, and extended the receivership to the foreclosure suit, and consolidated both suits into one. Ancilliary bills of foreclosure were filed in all the other districts mentioned and similar orders therein entered. Prior to the filing of the foreclosure bills the circuit court for the eastern district of Wisconsin had determined that the receivers ought not, in justice to the trust estate, to assume the lease of the Wisconsin Central lines, and they were surrendered to those companies; but there remained actually within the territorial jurisdiction of that court large amounts of property, moneys, supplies, etc., at the time of the filing of the bill of foreclosure. All the bills filed in the other districts alleged previous appointment of receivers by the court in the eastern district of Wisconsin, and those courts severally, by order, recited the previous appointment by that court and appointed the same receivers. They all recognized the eastern district of Wisconsin as being the court first acquiring jurisdiction and as the court of primary authority. For over two years the administration of the trust proceeded upon this theory, the receivers accounting to the court for the eastern district of Wisconsin and their accounts passed upon in the usual course of business.

In August, 1895, certain charges against the receivers were filed in the circuit court for the district of Washington. The receivers there protested that such charges ought properly to be heard by the circuit court for the eastern district of Wisconsin and asked that these charges be referred to that court. The rule of comity was invoked and discussed before that court. On the 2nd of September, 1895, that court by its order required the receivers to answer the charges by the 2d day of October, 1895, and also to file in that court a large bond in addition to the

The filing of charges in the federal court in the northern district of Washington against the receivers appointed by the circuit court for the eastern district of Wisconsin precipitated serious complications. The opinion of the court was delivered by Gilbert, Circuit Judge, in which Hanford, District Judge, concurred.[1] It was declared that the possession of the railroad property by the Wisconsin court could extend no further than the territorial limits of that court's jurisdiction; that all rights of that court beyond such jurisdiction were based on comity; "such comity," the court said, "rests upon the fact that another court is in the actual possession and operation of the property, which cannot well be subrogated, and which the best interests of all concerned require to be managed as a single system." It was said the rule of comity did not apply because there was no part of the railroad in the Wisconsin district, and no personal property was held there by the receiver.

The decision resulted in the presentation of a petition to Justices Field, Harlan, Brewer and Brown, sitting as circuit justices, whose circuits the Northern Pacific Railroad traverses, asking for a ruling and order that might be uniform in all the districts and avoid

bond of five hundred thousand dollars filed in the eastern district of Wisconsin, and also to file all their accounts in that court, except those which had been actually passed upon by the court in Wisconsin. Judges Gilbert and Hanford at that time filed opinions in which it was asserted that the case was not one for the application of the rule of comity, because, as they said, no part of the road proper was in the eastern district of Wisconsin.

The receivers deemed it useless and inadvisable to file their accounts in two courts, each assuming primary jurisdiction, and declining to be held responsible to two courts for the same acts when the orders of one might conflict with the orders of the other, and not desiring to stand in contempt of the circuit court for the district of Washington, on the 20th of September, 1895, tendered their resignations to the circuit court of the eastern district of Wisconsin, which court subsequently, on the 28th of September, appointed two gentlemen successors, who duly qualified. The circuit court for the district of Minnesota on the 30th of September, after full argument by all parties, confirmed those appointments and ordered the receivers to report to the circuit court of the eastern district of Wisconsin as the court of primary jurisdiction. On the 2d of October the circuit court of the district of Washington summarily declined to accept the resignations of the receivers tendered to that court, removed them and appointed one receiver for the road lying within that district. The circuit court for the district of Oregon, a day or two subsequently, appointed the same receiver named by the Washington court as receiver of the road lying within the state of Oregon. Subsequently the circuit court for the district of Montana appointed as receiver for the road within that state the same gentleman named by the circuit court for the district of Washington, together with two other gentlemen resident in the state of Montana.

[1] Farmers' Loan and Trust Co. v. Northern Pacific Railroad Co. 69 Fed. R. 871.

the trouble threatened by the decision of the federal court in Washington. From the opinion of these justices upon the petition we quote as follows: "We are of opinion that proceedings to foreclose a mortgage placed by a railroad company upon its lines extending through more than one district should, to the end that the mortgaged property may be effectively administered, be commenced in the circuit court of the district in which the principal operating offices are situated, and in which there is some material part of the railroad embraced by the mortgage; that such court should be the court of primary jurisdiction and of principal decree, and the administration of the property in the circuit courts of other districts should be ancillary thereto. But in view of what has transpired in these foreclosure proceedings, especially in view of the fact that a portion of the line of road owned by the Northern Pacific Railroad Company was and is within the State of Wisconsin, and that at the time of the filing of the creditor's bill, in which the trustee in the mortgage was a co-plaintiff, the Northern Pacific Railroad Company was operating its road through the eastern district of Wisconsin, although that part of its line so operated belonged to another company and was under lease to the Northern Pacific Railroad Company for 99 years; and in view of the further fact that the railroad company entered its appearance and assented to the act of the circuit court for the eastern district of Wisconsin in taking jurisdiction, and as such exercise of jurisdiction has been recognized by the circuit court in every district along the line of the Northern Pacific Railroad Company and by all parties, for the space of about two years, during which time many orders in the course of administration have been entered, we are of opinion that the circuit court for the eastern district of Wisconsin has jurisdiction to proceed to a decree of foreclosure which will bind the mortgagor company and the mortgaged property, and ought, therefore, to be recognized by the circuit courts of every district along the line of the road as the court of primary jurisdiction; and that proceedings in the latter court, while protecting the rights of local creditors, should be ancillary in their character, and subordinate to the proceedings in the court of primary jurisdiction."[1]

Mr. Justice Brown separately stated that, because the principal business offices of the railroad company were at St. Paul, the circuit court for the district of Minnesota should be considered and treated as the court of primary jurisdiction; but that for the sake

[1] Farmers' Loan and Trust Co. v. Northern Pacific Railroad Co., 72 Fed. R. 26.

of harmony of action he would waive his personal views and accede to the recognition of the circuit court for the eastern district of Wisconsin as the court of primary jurisdiction.

This opinion of the four justices of the United States supreme court is to be taken and accepted as the announcement of the rule which is to be followed in receivership proceedings affecting railroad property located in different federal judicial districts. The proceedings must be commenced in the district where the principal business offices of the company are located, and the court for that district will be the one of primary jurisdiction; and this regardless of whether the suit there pending shall have been first in time of commencement.

Where the property of the defendant, and especially of a railroad company, is located in but one state, but in different counties, the same rule should apply.[1]

Section 22. **Conflict Between Courts of Same State.**— As between courts of the same state when a receiver has been appointed by one court and has obtained possession of the property or fund over which he was appointed, he cannot be in any manner interfered with by a receiver subsequently appointed, or by any proceeding whatever in any other action brought in any other court. The court which first appoints a receiver has the sole disposition of the fund or property received by him as such, and is bound in the exercise of its judicial powers to make administration of it.[2]

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[1] See State ex rel. Merriam v. Ross, 122 Mo. 435. Regulated by statute in New York. United States Trust Co. v. N. Y., W. S. & B. R. R. Co. 67 How. Pr. 390.

The appointment by a state court of a receiver of railroad property located wholly within the state, gives that court exclusive jurisdiction over the *res*. Barton v. Barbour, 104 U. S. 126.

Of a railroad which traversed the states of New York, Pennsylvania and Ohio a receiver was first appointed in a state court of Ohio, and afterwards the same person was appointed receiver of the railroad company in the other two states. On an application to the New York court for the payment of a claim for rolling stock furnished, it was contended that, as a matter of comity, the subject should be remitted to the consideration of the court in Ohio; but it was held that the controversy was not of such restricted locality, but included the affairs and management of the receiver in the three states. "By the orders of the courts of these states," it was said, "the receiver was appointed and placed in possession of this line of railway, and he became accountable under the authority of these tribunals. * * * Instead of one being the principal and the others merely ancillary, they are concurrent;" and the authority of each was declared to be the same. United States Rolling Stock Co., *In re*, 57 How. Pr. 16.

[2] Text quoted and approved in Fisher v. Supreme Court of City and County of California, 42 Pac. R. 561; Stearns v. Stearns, 16 Miss 167; O'Mahony v. Belmont, 37 N. Y. Super. Ct. 380; McCarthy

On the same principle an application for the appointment of a receiver made to a United States court was refused, it appearing that a receiver had already been appointed by a similar court in another district of the same state; and the court held that "not till the proceedings in the first suit have so resulted that the property is no longer in the possession of the court through its receiver, can any other court or parties interfere with it."[1] Nor will such court entertain any motion to remove or otherwise interfere with a receiver appointed by another court. The parties aggrieved must seek redress in the court which has appointed the receiver.[2]

Section 23. **Conflict Between Courts of Different States.**— The several states of the United States being independent governments and foreign to each other in all matters not expressly delegated to the general government, the law with respect to the force and effect of the acts of the courts of one state in another, remains as if they were not politically associated, the well settled rule being that the laws, judgments, &c., of one state have no force beyond the limits of such state; but, as among foreign nations, considerations of comity and international courtesy have intervened to allow the laws, judgments, &c., of one nation to take effect in another, when the administration of justice so requires, and when the foreign law or judgment does not injuriously affect the citizens of the accommodating nation, so among the several states this rule has been observed, and has, indeed, been extended beyond its application among foreign nations, by reason of the more intimate commercial relations between them and because of their political association as equal members of one government.

These principles are applied to the appointment of receivers, and are well stated by Barrow, J., in a case where the claim of the foreign receivers was not allowed to prevail against a prior lien: "The receivers, who assert this claim here, are merely the servants of the court in New York, having legal authority co-extensive only with the jurisdiction of the court by which they were appointed. Upon principles of comity, often recognized and always acted on, except when they come in conflict with paramount rights of suitors in our courts, they might be admitted here to protect the interests and enforce the claims of the corporation, of whose affairs they are the legal guardians there. But equity does not require us to permit the

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v. Peake, 9 Abb. Pr. 164; Pugh v. Brown, 19 Ohio, 202, 211.

See sections 17 and 18.

[1] Young v. Montgomery & E. R. Co. 2 Woods, 606.

[2] Ibid.

exercise of such privileges to the detriment of our own citizens, who are pursuing appropriate legal remedies in this court." [1]

Section 24. **The Principle of Comity.**—The principle of comity, however, is carefully restricted to cases where no vested or acquired rights of the citizens of the state extending such comity will be affected injuriously; as where creditors of a foreign corporation have, by proper proceedings, acquired liens by attachment in their own state, and a claim to the property subjected to such liens is made by receivers appointed by the foreign state.[2] It is also a well-established general rule, founded upon reasons of public policy, that the courts of one state or county cannot make a decree ordering the conveyance of land situated in another jurisdiction, which will be recognized as valid and binding by the courts of that state.[3]

Pending proceedings in foreclosure against a railroad in Kentucky, a creditor, being a resident of that state, attached property covered by the mortgage found in Ohio, and claimed a lien prior to the right of a receiver subsequently appointed by the court in Kentucky. It was held by the Ohio supreme court that, under comity between states, the receiver might assert his claim in an Ohio court where his right did not conflict with the rights of citizens of that state.[4] It is also said that, where attachments are levied against a railroad before a receiver is appointed, in a suit pending before a federal court in another state, they will not be affected by his subsequent appointment.[5]

Where a receiver duly appointed with power to sell and convey the property of a corporation, assigns an indebtedness due to it from a citizen of another state, such assignment has been held sufficient to give the purchaser the right to bring an action in the courts of such other state for the purpose of collecting the indebtedness.[6] Where a receiver has been appointed by a state court the court of

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[1] Hunt v. Columbian Ins. Co. 55 Me. 290. See also Willitts v. Waite, 25 N. Y. 577; Taylor v. Columbian Ins. Co. 14 Allen, 353; Hoyt v. Thompson, 5 N. Y. 320; Hoyt v. Thompson's Exr. 19 N. Y. 207.

[2] Hunt v. Columbian Ins. Co. 55 Me. 290. This question has been most frequently considered in cases where an assignment in insolvency or bankruptcy has been made in the foreign state. For a discussion of this question see 2 Kent's Com. (13 ed.) 406, with cases cited, and see also Story's Conflict of Laws, §§ 419, *et seq.*

[3] Moseby v. Burrow, 52 Tex. 396, 404, citing White v. White, 7 Gill & J. 210; Page v. McKee, 3 Bush. (Ky.) 135; Watts v. Waddle, 6 Pet. 400; Paschal v. Acklin, 27 Tex. 173.

[4] Bank v. McLeod, 38 Ohio St. 174 (1882).

[5] South Carolina R. R. Co. v. People's Savings Institutio 64 Ga. 18.

[6] Hoyt v. Thompson, 5 N. Y. 320, reversing S. C., 3 Sandf. 416.

another state may, when necessary, appoint an ancillary receiver in such state.[1]

"The nature of the union between the states, as members of a common government, the vital interests which bind them together, should lead us to presume a greater degree of comity in commercial, as well as in political affairs, than we should be authorized to presume between states wholly foreign to each other."[2]

Section 25. **Conflict Between State and Federal Courts.**—The peculiar system of dual government created by the adoption of the constitution of the United States, which reserves to the several states all powers not delegated by them to the general government, is notably illustrated in the organization of United States courts having jurisdiction, conferred by federal statutory law, over territory within the limits of the individual states. In many cases their jurisdiction is concurrent with that of the state courts, and many important questions as to their relative powers and duties have been the subject of consideration and decision.

The same principle of comity which has already been noticed as actuating the settlement of similar questions between courts of the different states, has been invoked for their determination, until the rule is now well settled by the practice of the courts under both systems, that the court which first acquires jurisdiction of the *res*, or subject matter, will retain such jurisdiction until the final disposition of the case.[3] While this rule is subject to limitations, it is well settled that, while the property is in possession of a court, either actually or constructively, that court is bound to protect its possession from the process of other courts.[4] On the other hand, so long as such possession is not disturbed or questioned, parties may litigate, in the same court or elsewhere, questions concerning the ultimate right and title to the property.[5] Its receiver will not be disturbed in his possession by other courts acting after his appointment.[6]

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[1] Williams v. Hintermeister, 26 Fed. Rep. 889.

[2] Johnson, J., in Bank v. McLeod, 38 Ohio St. 174 (1882).

[3] See sections 683 *et seq.*

[4] See sections 17 and 18.

[5] Buck v. Colbath, 3 Wall. 334, 342; Andrews v. Smith, 19 Blatchf. 100.

[6] The Holliday Case, 27 Fed. Rep. 830, 843.

[7] Blake v. Alabama & C. R. R. Co. 6 Nat. Bank Reg. 331; Keep v. Michigan L. S. R. Co. 6 Chicago Leg. News, 101; Sedgwick v. Menck, 6 Blatchf. 156; s. c., 1 Nat. Bank Reg. 675; Alden v. Boston. H. & E. R. Co. 5 Nat. Bank Reg., 230; Bill v. New Alb. R. R. Co. 2 Biss. 390; Union Trust Co. v. Rockford, R. I. & L. R. Co. 7 Chicago Leg. News, 33; Storm v. Waddell, 2 Sandf. Ch. 494; Hutchinson v. Green, 6 Fed. Rep. 833; Spinning v. Ohio L. Ins. & Tr. Co. 2

A federal court has insisted upon exercising the exclusive control obtained by its having first had cognizance of the matter in controversy, in a case where a receiver was appointed by a state court, in the interval between the filing of an insufficient bill and the filing of an amended bill in the federal court.[1] A receiver appointed by a federal court has no greater power as to bringing actions in the state courts than one who is appointed by the state courts.[2] A federal court has no power to appoint a receiver and seize property already in the possession of a receiver appointed by a state court.[3]

It has been held that the decision of the state court that one of its courts had been in possession of the property for several years, and that the appointment by a federal court of a receiver was ineffectual to divest the control of the former court, did not deny any federal right so as to confer jurisdiction upon the supreme court of the United States.[4]

Section 26. **Conflict Between an Assignee in Bankruptcy and a Receiver.**— While the National Bankruptcy Law was in force the question under review was frequently before the courts, in cases where bankruptcy proceedings were instituted by or against debtors after their property was in the custody and control of receivers appointed by the state courts. Applying the rule as above stated, the state courts have retained the jurisdiction acquired by them over such property before the bankruptcy courts had cognizance of the subject matter.[5] In the last named case it was held that a receiver appointed by a court of the United States who had interfered with the possession of a receiver previously appointed by the state court could be punished as for a contempt of the latter court.

This claim of the state courts has been fully recognized by those of the United States,[6] but the decisions are not entirely uniform.[7]

Disney, 336; May v. Printup, 59 Ga. 129; Eisenmann v. Thill, 1 Cin. Super. Ct. 188; Bruce v. M. & K. R. R. Co. 16 Fed. Rep. 342; Beecher v. Bininger, 7 Blatchf. 170; *In re* Clark & Bininger, 4 Benedict, 88; Conklin v. Butler, 4 Biss. 22.

[1] See a decision by Drummond, J., in Gaylord v. Fort Wayne, M. & Cin. R. Co. (U. S. Cir. Ct., Dist. of Ind. 1875), 6 Biss. 286.

[2] Battle v. Davis, 66 N. C. 252.

[3] Shields v. Coleman, 157 U. S. 168.

[4] Mo. Pac. R. R. Co. v. Fitzgerald, 16 S. C. R. 389.

[5] Watkins v. Pinckney, 3 Edw. Ch. 533; Storm v. Waddell, 2 Sandf. Ch. 494; Eisenmann v. Thill, 1 Cin. Super. Ct. 188; Spinning v. Ohio L. Ins. & Tr. Co. 2 Disney, 336.

[6] *In re* Clark & Bininger, 4 Benedict, 88; Davis v. Railroad Co. 1 Woods. 661; Beecher v. Bininger, 7 Blatchf. 170; Alden v. Boston, H. & E. R. Co. 5 Nat. Bank Reg. 230; Sedgwick v. Menck, 6 Blatchf. 156; s. c., 1 Nat. Bank Reg. 675; *In re* Hulst, 7 Benedict, 17.

[7] Platt v. Archer, 9 Blatchf. 559; *In re* Merchants' Ins. Co. 3 Biss. 162.

Where, however, a receiver was appointed in proceedings in the state court which were unauthorized, such appointment was held to be no defense in favor of the receiver as against an assignee duly appointed by the bankruptcy court.[1]

Section 27. **Conflict in Foreclosure Proceedings.**— Similarly, where a party inaugurated proceedings in foreclosure in a state court after he has begun a similar suit in a federal court, and before adjudication, and the state court appointed a receiver and made a decree of foreclosure, under which a sale was made, the Federal court regarded the action of the state court as an interference, and, on application of a bondholder, appointed a receiver and proceeded to adjudicate the rights of all who had been before it.[2]

In recognition of the same principle, the state courts have refused to take cognizance of a suit to foreclose when the mortgaged property was in the possession of a receiver appointed by a federal court, and has relegated the applicants to that court for relief;[3] but in a case involving the rights of several mortgagees of a steamboat, besides judgment and execution creditors, attaching creditors and libellants in admiralty, at whose suit the United States marshal had taken possession of the vessel, it was held that the state court would, upon motion of one of the mortgagees, appoint a receiver to represent the claimants other than those having filed libels, and for the purpose of obtaining for distribution in the state court, should the federal court see fit, any surplus remaining in the latter court from the proceeds of the vessel after the claims of the libellants had been satisfied.[4] But a federal court, in one instance at least, took cognizance of an action to foreclose when the property was in possession of a receiver of a state court in a similar action, taking the ground that it could not disown its jurisdiction; but it refused to interfere with the receiver or to molest his possession.[5]

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[1] Buchanan v. Smith, 16 Wall. 309; s. c. 7 Nat. Bank Reg. 513.

On removal of a receivership proceeding from a state to the federal court, the latter has full power over the receiver. McHenry v. New York, Pennsylvania & Ohio Railroad Co. 25 Fed. R. 114. Same rule prevails on change of venue. *Ex parte* Haley, 99 Mo. 136.

[2] Bill v. New Albany, etc. R. R. Co. 2 Biss. 390. Consult also Union Trust Company v. Rockford, Rock Island & St. Louis R. R. Co. 6 Biss. 197.

[3] Milwaukee & St. P. R. R. Co. v. Milwaukee & Minn. R. R. Co. 20 Wis. 165.

[4] Thompson v. Van Vechten, 5 Duer. (N. Y.) 618.

[5] Mercantile Trust Co. v. Lamoille Valley R. R. Co. 16 Blatchf. 324.

See further upon subject of this section, chapter upon receivers of mortgaged property.

Section 28. **Instances of the Application of the Principle of Comity Between Federal and State Courts.**—A receiver being the officer of the court which appoints him, and being subject only to the control of that court, an application to a federal court for an accounting by a receiver appointed by a state court will be denied and the aggrieved party referred to the state court for his remedy.[1] Nor will a state court grant a writ of assistance to the receiver of another state court to enable him to obtain possession of property already in the hands of a receiver acting under the United States court.[2] So a state court has refused to enforce the payment of a judgment recovered against a railway for damages to property, as against the receiver appointed by a federal court for the railway, and this was so held where a state statute contained a provision for the enforcement of such judgments out of funds in the hands of receivers or agents, and the judgment creditor was required to resort to the federal court for leave to sue the receiver, or for an order upon him to pay the judgment.[3]

Section 28a. **Of Ancillary Receiverships.**— In connection with the subject of conflicts between courts in the appointment of receivers it is proper to consider ancillary receiverships, which are incident to receivership proceedings in one state or judicial district affecting the same property, or property of the same defendant, which is the subject-matter of prior proceedings in another state or judicial district.

The principles attending such ancillary or auxiliary proceedings are those of comity rather than of compulsion, and invoke harmonious action between courts of different territorial jurisdictions in administering the same estate. The doctrine is one of necessity, occasioned because a court cannot by its order or decree affect and control property in another jurisdiction.

A feature of ancillary receiverships is that the same person is generally, though not always or necessarily, appointed receiver. Thus his power becomes coextensive in every jurisdiction wherein he is appointed,[4] and a complete and uniform management of the property is secured.

Ancillary receiverships arise most frequently in proceedings against railroads, and their wisdom and usefulness are exemplified in such connection.

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[1] Conkling v. Butler, 4 Biss. 22.

[2] Gelpeke v. Milwaukee & H. R. R. Co. 11 Wis. 454.

[3] Ohio & M. R. R. Co. v. Fitch, 20 Ind. 498.

[4] Rust v. United States Waterworks Co. 70 Fed. R. 129.

The doctrine may be elucidated by reference to cases concerning it.

Where a railroad receivership has been extended by ancillary appointment over the property of the company in another jurisdiction, the court therein will not, even if it has the power, extend the receivership to, or appoint additional receivers in another independent and original suit; for the rule of comity as well as the interests of all concerned, require that the road should be operated under one management and as an entirety.[1]

It has been held by eminent jurists that the federal circuit court has no jurisdiction to entertain a bill which has for its only purpose an ancillary appointment.[2] But such bills have been and are now frequently entertained by the federal circuit court,[3] and granted generally *ex parte*, but subject to full hearing on motion to vacate the order.

A judgment rendered against an ancillary receiver, binds only that portion of the estate which came into his hands as ancillary receiver, and does not operate as a final adjudication against the receiver appointed by the court of original jurisdiction. "Where a receiver or administrator or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the state. Whatever orders, judgments or decrees may be rendered by the courts of another state, in respect of so much of the estate as is not within its limits, must be accepted as conclusive in the courts of primary administration. Whatever matters are by the courts of primary administration permitted to be litigated in the courts of another state, come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a state in which ancillary administration is held are not conclusive upon administration in the court of the state in which primary administration is had. * * * Whatever may be the relief, jurisdiction is acquired by the court before which administration proceedings are commenced the moment they are commenced, and when the estate is taken possession of by a tribunal of a state, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in a court of another state, either

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[1] New York, Pennsylvania & Ohio Railroad Co. v. New York, Lake Erie & Western Railroad Co. 58 Fed. R. 268.

[2] Harlan and Jackson, JJ., in Mercantile Trust Co. v. Kanawha & Ohio Railway Co. 39 Fed. R. 337.

[3] Platt v. Philadelphia & Reading Railway Co. 54 Fed. R. 569.

voluntarily or by submitting himself to the jurisdiction of the latter court."[1]

Of a railroad which traversed the states of New York, Pennsylvania and Ohio a receiver was first appointed in Ohio and afterwards in ancillary proceedings in the other two states. On an application of the petitioner for the payment of sums due it for rent for rolling stock it was contended that, as a matter of comity, the subject should be remitted to the consideration of the court of Ohio. It was held that the controversy had no such restricted locality but included the affairs and management of the receiver in all three states. "By the orders of the courts of these states," the court said, "the receiver was appointed and placed in possession of this line of railway, and he became accountable under the authority of these tribunals. And by the agreement presented his entire receipts and obligations were comprehended. This was severally sanctioned by the orders of these three courts. Instead of one being the principal, and the others merely ancillary, they were all concurrent, and each expressed substantially like authority." It was held that any one of the courts might in turn properly direct the observation of contracts.[2]

The receiver of the Supreme Sitting of the Order of Iron Hall, appointed in Indiana, filed his petition in Massachusetts for the appointment of an anciliary receiver to take charge of the affairs of the association in the latter state. The court said: "Without considering the right of a receiver appointed by a court of equity in a foreign jurisdiction, under general equity powers, to sue or intervene in his own name in this commonwealth, we think it clear that Mr. Failey (who was the receiver appointed in Indiana) on the allegations of his petition must be taken to be, in effect, an assignee of a foreign insolvent corporation. * * * Wherefore such an assignee has a standing to intervene in and be heard on a proceeding in this commonwealth for the appointment of a receiver of the corporation found here."[3]

In Michigan an ancillary receiver was also appointed of the same order, and it was held that local branches in that state could not refuse, without good cause, to deliver to him the assets held by them; and that when the receiver has possession of such assets the court would order them transmitted to the domiciliary receiver, but

[1] Reynolds v. Stockton, 140 U. S. 254.
[2] *In re* United States Rolling Stock Co. 57 How. Pr. 16.
[3] Boswell v. Order of Iron Hall, 86 N. E. R. 1065.

upon condition that local claimants should receive the same distributive share as would be paid to others.[1]

Concerning the same order this was said in Pennsylvania: "In an association like the Iron Hall where all of the members though residing in different jurisdictions are bound by a common contract by the supreme representative of the order, if a court at the domicile of the association appoints a receiver on account of its insolvency, it is competent for a court in another jurisdiction to order trust funds held by a local branch to be paid into the hands of the receiver. * * * In such a case the state other than where the association was organized will order the funds in the hands of a receiver appointed in the latter state to be paid to the original receiver."[2]

Contrary to the foregoing cases the supreme court of Connecticut held that while the Order of Iron Hall was a "going concern" and able to discharge its trust duties, it would be the duty of the court to have the Connecticut receiver remit the funds in his hands to the general officers of the order; but as the corporation was insolvent, disorganized and unable to carry out the purposes of its incorporation it was incumbent upon the court to see that no injustice be gone to its own citizens who were certificate holders and that it would not require the funds to be remitted to the Indiana receiver for distribution under the orders of the Indiana court; that the Connecticut court could better protect the citizens of that state and would do so.[3]

Where the federal court in Tennessee had primary jurisdiction it was held that the federal court in Georgia would assume jurisdiction to determine the question as to the priority of claims filed therein on judgment recovered in Georgia over the lien of the mortgage bonds, and would not remit such question to the court in Tennessee.[4]

Receivers of a railroad were first appointed by the federal court in Nebraska, and afterward in ancillary proceedings in Colorado and Wyoming. The federal court in Nebraska, the court of primary jurisdiction said: "So far as the general management of the trust imposed upon them, the general operation of the railroad system in their charge in this circuit, and their general accounting are

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[1] Baldwin v. Hosmer (Mich.), 59 N. W. R. 432.

[2] Kean v. Order of Iron Hall, 3 Pa. D. R. 323; Durward v. Jewett, 15 So. R. 386; Ware v. Order of Iron Hall (N. J. Ch.), 28 At. R. 1041.

[3] Fawcett v. Order of Iron Hall, 64 Conn. 170.

[4] Central Trust Co. v. East Tennessee Virginia & Georgia Railway Co. 69 Fed. Rep. 658.

concerned, they must report to and be governed by this court sitting in Nebraska * * * ; but the circuit court in the districts of Colorado and Wyoming have jurisdiction to hear and determine the claims of the citizens of those districts against the insolvent corporation, and the receiver of it, and their determination of those matters will be equally respected by the court sitting in Nebraska. Citizens of one district will not be required to go into another district to assert their claims against receivers appointed by the courts of both districts."[1]

It is elementary that the appointment of a receiver in ancillary proceedings will not be made to the prejudice of the rights of resident creditors.[2]

[1] Ames v. Union Pacific Railway Co. 60 Fed. R. 966.

[2] Borton v. Brines-Chase Co. (Pa.), 34 At. R. 597.

CHAPTER IV.

WHO MAY BE APPOINTED RECEIVER—ELIGIBILITY.

Section 29. The Receiver Must be an Indifferent Person.
30. The Selection is a Matter of Discretion.
31. When the Parties Agree upon a Person for Receiver.
32. The Rule to be Followed in Appointing Receivers.
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Section 29. **The Receiver Must be an Indifferent Person.**—A receiver being an officer of the court whose duty it is to receive and preserve the property in controversy, *pendente lite*, on behalf of the court and for the benefit of all parties in interest,[1] and being so clearly a representative of the court as to have been frequently referred to as the "hand of the court,"[2] it is of the first importance that the person appointed shall fully and faithfully represent the

[1] Bank v. McLeod, 38 Ohio St. 174; Booth v. Clark, 17 How. 322; Waters v. Carroll, 9 Yerg. 102; Baker v. Administrator of Backus, 32 Ill. 79; Devendorf v. Dickinson, 21 How. Pr. 275; Davis v. Duke of Marlborough, 2 Swanst. 108; Hooper v. Winston, 24 Ill. 353; Kaiser v. Kellar, 21 Iowa, 95; King v. Cutts, 24 Wis. 627; Osborn v. Heyer, 2 Paige, 342; Curtis v. Leavitt, 1 Abb. Pr. 274; Brown v. Northrop, 15 Abb. Pr. (N. S.) 333; Corey v. Long, 43 How. Pr. 497; s. c., 12 Abb. Pr. (N. S.) 427; Williamson v. Wilson, 1 Bland. 418; Ellicott v. Warford, 4 Md. 80; Van Rensselaer v. Emery, 9 How. Pr. 135; Meier v. Kansas Pacific R. R. Co. 5 Dill. 476. But see Kellar v. Williams, 3 Rob. (La.) 321.

[2] Ellicott v. Warford, 4 Md. 80; Williamson v. Wilson, 1 Bland. 418; Runyon v. Farmers & Mech. Bank, 3 Green's Ch 480; Van Rensselaer v. Emery, 9 How. Pr. 135.

court, having no such personal interest in the controversy or in the property in his charge, as would prevent the exercise of his duties and powers without favor to any of the parties.[1]

Although there may be nothing against the character or ability of a person, yet if he have a private interest in conflict with the management, he will not be selected to receive and manage, and will be removed if he already lawfully occupies the office.[2] There may be cases, however, in which a court will be justified in appointing a person who has an interest in the property in controversy, as where a mortgagee was appointed in England as receiver of the mortgaged property, without asking him for additional security, the property being real estate in the West Indies.[3]

Section 30. **The Selection is a Matter of Discretion.** — The selection of a particular person to act as receiver is, consequently, a matter peculiarly within the discretion of the court, having in view the special circumstances of each case, and the fitness of the candidate for the position by reason of his occupation, experience and character.[4]

As in other cases o. judicial discretion special and convincing circumstances must be shown to secure a review by an appellate court of its exercise by an inferior tribunal.

Lord Justice Knight Bruce well stated the rule when he observed that "to induce the court to act in such a case, against the decision of the lower judge by whom the selection has been made, it would be necessary to find some (if I may use the expression) over-

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[1] The selection of an improper person for receiver does not render the appointment void, San Antonio & Aransas Pass Ry. Co. v. Adams (Tex. Civ. App.) 32 S. W. R. 733.

To maintain an exception to the appointment of a receiver a strong case of disqualification is necessary. Tharpe v. Tharpe, 12 Vesey Jr. 317.

[2] Tripp v. Chard Ry. Co. 21 Eng. L. & Eq. 53; Atkins v. Wabash, St. L. & Pac. Ry. Co. 29 Fed. Rep. 161 (1886).

The president of a bank, which was a preferred creditor by assignment, was held not to be a proper person for receiver in an action to set aside the assignment, though of conceded honesty and ability. People's Bank of East Orange v. Fancher, 21 N. Y. S. 545.

[3] Davis v. Barrett, 13 L. J. (N. S.) Ch. 304. In this case the report says that "no direct authority could be produced in favor of the application."

[4] Lupton v. Stephenson, 11 Ir. Eq. 484; Cookes v. Cookes, 2 De G. J. & S. 526; Perry v. Oriental Hotel Co. L. R. 5 Ch. App. 420; Williamson v. Wilson, 1 Bland. 418; Smith v. New York Con. Stage Co. 28 How. Pr. 208; *In re* Empire City Bank, 10 How. Pr. 498; Wynne v. Lord Newborough, 15 Ves. 283.

Text approved in Robinson v. Dickey, 42 N. E. R. (Sup. Ct. Ind.), 638, it being said that the court will not interfere with the selection of a receiver, except where there has been a clear abuse of discretion.

whelming objection in point of propriety of choice, or some objection fatal in principle."[1] And Lord Justice Turner in the same case, where one of the defendants had been appointed receiver of rents in controversy, observed that "if the existence of differences and disputes is to be considered as a question of principle affecting the appointment of a receiver, it is obvious that there could hardly be any case in which it would not be competent to the parties to come here, by way of appeal from the appointment of a receiver; for in cases where receivers are appointed it is almost always in consequence of the differences and disputes between the parties," and his Lordship refused to interfere with the appointment.[2]

But in a case where a wholly unobjectionable person was proposed by the defendants and rejected by the inferior court, and it was plain that the selection of another person would occasion a great and unnecessary expense, the appellate court, in order "to save expense, and treating this as a question of principle," did not hesitate to order a change made.[3] And where the person nominated did not understand the care of machinery of which he was to have charge, but gave an undertaking to attend to the directions of one who did, he was removed by the appellate court.[4]

In the exercise of its discretion as to an appointment, the court will receive suggestions and recommendations from the parties in interest. The recommendation of a creditor coming in under a creditor's bill by petition, is entitled to consideration in making the appointment of a trustee to sell the property sought to be subjected, although the validity of his claim has not been determined upon; but where the amount of his claim does not appear by the petition, the recommendation of the original complaint will have most weight.[5] It is otherwise, however, in the court of chancery in Ireland, where it is not the practice to appoint a person who is agreed upon by the parties.[6]

Section 31. **When the Parties Agree Upon a Person for Receiver.**— In case the parties have formally agreed upon a person to manage the matters to be placed in charge of a receiver, such person will be favorably considered by the court for the appointment. Where two insurance companies established a joint general agency and stipu-

[1] Cookes v. Cookes, 2 De G. J. & S. 526.

[2] Ibid.

[3] Perry v. Oriental Hotel Co. L. R. 5 Ch. App. 420.

[4] Lupton v. Stephenson, 11 Ir. Eq. 484. *Cf.* Lockhart v. Gee, 3 Tenn. Chan. 332 (Cooper Chan.)

[5] Watkins v. Worthington, 2 Bland. 509.

[6] Leach v. Tisdal, 4 Ir. Ch. (N. S.) 209.

lated that upon its termination the general agent should close up its affairs, and, on the happening of the event, one of the companies endeavored to prevent him from discharging the duties devolving upon him under the stipulation, the court, on application of the other company, issued a restraining order and appointed the general agent as its receiver to wind up the affairs of the agency.[1] Where a bill prays for the appointment of a particular person as receiver, and such person is appointed, it will be presumed that the court appointed him on its own judgment, and not because of the recommendation or prayer of the bill.[2]

Section 32. **The Rule to be Followed in Appointing Receivers.**—In the recent Northern Pacific Railroad litigation Judge Jenkins said, concerning the appointment of receivers: "A receiver is the officer of the court, the right-hand of the court—in the management of the trust. It has too often been considered that the receiver is a mere agent of the contesting parties to the suit. He should be in a large sense, if not wholly, indifferent and impartial as between the conflicting interests involved. He should have no object to serve except to conserve the property in the interest of whosoever shall be adjudged to be entitled to it. He should not be concerned in any war of factions, nor interested in favor of or opposed to any scheme of re-organization. He should be strictly impartial and solely devoted to the preservation of the property. * * * The receivers to be appointed by this court must come within the definition of the law as I construe it, and within the principles stated. They must be men entirely indifferent between contending factions. They must be men that have had no connection with this conflict. They must be men who are strictly impartial and will perform their duty in single devotion to the trust and with no ulterior purpose to serve." [3]

We accept and unqualifiedly approve this clear and just announcement and submit it as a rule to be strictly followed and rigidly enforced in selecting persons to serve as receivers.

Section 33. **Friendly Receivers.**—The announcement of Judge Jenkins quoted in the preceding section disfavors and excludes the appointment of persons who would be within the meaning of the term "friendly receiver," which term is defined in a previous sec-

[1] Hanover Fire Ins. Co. v. Germania Fire Ins. Co. 38 Hun. 539.

[2] Johns v. Johns, 28 Ga. 81.

[3] Farmers Loan and Trust Co. v. Northern Pacific Railroad Co., eastern district of Wisconsin. Not reported.

tion.[1] This class of receivers is subject to most serious objections and their appointment should be discouraged and avoided. If the business and property of the defendant are such as to call for the continuance over them of one previously connected and familiar with them such selection may be properly made in urgent cases as associate, but not sole receiver. But the necessity for such appointment may be usually avoided, because such person may be employed to render assistance in administering the receivership.

The "friendly receiver" most usually, but not always or necessarily results from an agreement between the parties to the cause to suggest and request the appointment of a person not wholly and really disinterested and indifferent, and, to quote from Judge Jenkins, "the appointment has usually followed as of course; for, if the parties are content, the court, it is said, may well be satisfied." This objectional receiver is most commonly the supposed "right hand of the court" in proceedings against corporations, and especially railroad companies, receivership proceedings against which gave origin to the term.

The opinion of Judge Jenkins in the case of Farmers' Loan and Trust Company v. Northern Pacific Railroad Company, which is given in full in note below,[2] clearly and forcibly announces as strong

[1] Sec. 3.

[2] The opinion of Judge Jenkins in the case cited was delivered on Sept. 28th, 1895, and has never been published. It was occasioned by the resignation of the three original receivers of the Northern Pacific Railroad Company, Messrs. Oakes, Payne and Rouse, which was caused by the conflict between the federal courts over the Northern Pacific receivership proceedings. The opinion is of such importance concerning the appointment of officrs of defendant corporations as receivers that it is here published in full, the correctness of the copy furnished being vouched for by Judge Jenkins:

Jenkins, Circuit Judge: "It was yesterday suggested by one of the counsel for the trustee, that it would only be necessary to appoint two receivers in place of the three receivers resigned. The court is not, at the present time, sufficiently informed to be able to declare that the labor involved in the management of this vast trust estate can be properly performed by, or should be imposed upon, two persons only; but desiring to keep the expense of administration at the minimum at which the road can be properly managed, and the suggestion remaining uncontroverted by counsel for any of the parties, the court is willing to venture the experiment and to test the practical operation of the scheme and will be contented, at this time, with the appointment of but two receivers. If at any time the welfare of the large interests involved should, for any reason, demand the appointment of a third receiver, the matter can be readily provided for.

"I have given to the subject of the personnel of the receivers to be appointed the best thought and reflection of which I am capable. Since the resignations became known to me, and during the interval since the adjournment of the court on yesterday, I have considered the names of gentlemen sug-

reasons why the appointment of "friendly receivers" should neither be encouraged nor tolerated, whether with or without the con-

gested by counsel, and other names that have occurred to myself.

"I think it pertinent to the occasion to say something of the principle by which the court should be guided, and upon which it should act with respect to receiverships and the appointment of a receiver. A receiver is the officer of the court, the right-hand of the court in the management of the trust. It has too often been considered that the receiver is a mere agent of the contesting parties to the suit. He should be in a large sense, if not wholly, indifferent and impartial as between the conflicting interests involved; he should have no object to serve except to conserve the property in the interest of whosoever shall be adjudged to be entitled to it; he should not be concerned in any war of factions, nor interested in favor of or opposed to any scheme of re-organization; he should be strictly impartial and solely devoted to the preservation of the property. When he goes beyond that line he oversteps his duty, to the injury of the estate and in violation of the confidence reposed in him by the court.

"To a certain extent the practice in the case of railway receiverships has obtained that the parties in interest agree upon one or more receivers, and suggest the names agreed upon to the court. The appointment has usually followed, as of course, for, if the parties are content, the court, it is said, may well be satisfied. Such receivers have severally represented conflicting interests, uniting for the one purpose, and as the fight waxes warmer between conflicting interests, the heat of the conflict is usually communicated to the receivership, which in turn becomes a mere war of factions among the officers of the court. This was but recently exemplified in a receivership in the northern district of Illinois, where the receivers of the court, as the war became bitter and they became unable amicably to execute the trust, insulted the court by resignations conditioned upon the appointment of a particular receiver. Such conduct shall not again occur in any court over which I shall have the honor to preside without merited punishment. The property is placed in the custody of the court, not to be operated by the parties, or by any of them, but by the court. The receivers of the court should owe no other allegiance than to the court. I think the experience in all railway receiverships is bringing the courts back to the fundamental principle of the law upon which receiverships are based, and that hereafter it will be found that when a court is asked to take property into its possession and management in the interest of parties because they cannot manage it themselves, it will be a management by men selected by and acting under the orders of the court, and not by the representative of any conflicting interest involved.

"Now, to come to the question in hand. The receivers to be appointed by this court must come within the definition of the law as I construe it, and within the principles stated. They must be men entirely indifferent between contending factions. They must be men that have had no connection with this conflict. They must be men who are strictly impartial and will perform their duty in single devotion to the trust and with no ulterior purpose to serve. They must be men of high character, in whom not only the court but the parties, and, with respect to this great transcontinental railway, the public, shall have unquestioned confidence. As but two receivers will, for the time being, be named, it has seemed to me proper that one of these gentlemen should be a practical railroad man of experience and acquainted with the needs and conditions of this railroad. As I had previous occasion in this litigation to observe, 'for the operation of

sent of the parties to the action. As a rule the parties to the proceeding are not the only ones interested in the administration of

a vast system like that of the Northern Pacific, it seems desirable that one of its receivers should be a gentleman familiar with the intricate details and with the necessities peculiar to the system. For however well qualified one may be to railroad management in general, he would, at least for a considerable time, be at sea with respect to the management of a transcontinental railroad like that of the Northern Pacific.'

"The other gentleman to be named should be a financial man of experience and acknowledged ability that he may be able to successfully manage the finances of the road.

"I have also come to the conclusion that the one who is to take charge of the practical management of the road should be a resident of the city of St. Paul, where its general offices are located and from which place the practical management of the road is conducted. There is a gentleman, whose acquaintance I have recently made, who has been for a long time connected with the Northern Pacific road, in its construction, maintenance and management, who knows every inch of the ground, who for years has devoted his life to the building up of that road, who has been concerned in no war of factions within the corporation, who has had no financial interest in it, who is a man of high character, of great ability. The court has that confidence in him and in his ability, honor and integrity, that I confidently declare my belief and judgment that his work will speedily show that he is thoroughly qualified for the supervision and management of the practical construction, maintenance and operation of this railroad. That gentleman has been for years the chief engineer of the road, is known all along the line of it, and possesses the confidence of people along its line, and, as I am informed, of every court within whose jurisdiction the road is located; I believe his appointment will commend itself to the good sense and judgment of all courts which may be called upon to ratify this nomination. I shall, therefore, appoint as one of the receivers, Mr. Edwin H. McHenry, of St. Paul, the present chief engineer of the road.

"With respect to the financial gentleman who should be appointed with Mr. McHenry to execute this trust, the court has been confronted with this difficulty. There would seem to be a certain propriety that both of these receivers should be residents of the city of St. Paul, that they might readily cooperate with all the general officers of the road. This idea has impressed me strongly. But, upon the contrary, the thought has occurred to me that at least one of these receivers should reside within the jurisdiction of the court and be in close touch with the court. I have anxiously considered these two opposing ideas, and I have concluded that, under all the circumstances surrounding this case, it is proper and right that one of these receivers should be resident within the jurisdiction of this court. The objection that the business cannot so well be performed as if they were both residents of one city is not controlling. It has seldom, if ever, been considered essential in the case of receiverships of transcontinental lines. Ordinarily it has been deemed necessary that one or more of the receivers should be resident of great financial centers, like New York. Certainly the objection, if it be valid, is minimized by the fact that a night's journey would put these parties in personal communication. The one to be appointed, who may be designated the financier of the receivership, should be one well and thoroughly known to the financial world, a man of undoubted integrity, a man of the highest char-

the receivership, and it is the interests of all concerned, whether parties or not, that should be considered in selecting the person to perform the duties of receiver.[1]

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acter and one of financial responsibility, one whose name will give confidence to the parties in interest and to the public, that the many interests of this great enterprise will be safely conserved. I have concluded to appoint to that position Mr. F. G. Bigelow, the president of the First National Bank, of Milwaukee. So far as I know or am able to forecast, nothing can be said against either of these gentlemen with respect to this trust estate and their connection with it. Neither have been interested in any of the conflicts, or with the former management of this road, neither of them are involved in the scandals which have arisen with respect to this road, nor in any way bound to those who were entangled with the road, or affected by such scandals. I think that these appointments ought to satisfy all parties in interest who really desire the good of this estate and give assurance that not only will the public interests connected with this transcontinental line be properly cared for, but that the private interests of everyone interested in it will be faithfully and well disposed. If at any future time the occasion shall arise, when it shall seem desirable for any reason, that a third receiver should be appointed, the court will meet the wishes of the parties in respect to anything that may tend to produce harmony and the welfare of the trust estate.

"Counsel may prepare an order for the appointment of these receivers, accepting the resignation of the old receivers and requiring them, within a time to be mentioned, to file their accounts, that they may be passed upon by the court in the usual way, subject to the examination and objection of any party in interest, providing that they shall turn over this trust estate to the new receivers, as of midnight, between the 30th day of September and the 1st day of October, 1895, and transfer to the new receivers all the monies and properties of the trust, and that the new receivers shall each, within ten days, give a bond to this court in the penal sum of $500,000, with surety to be approved by the court.

"Mr. Turner, counsel for trustee:

"If your Honor please, perhaps it will not be improper for me on behalf of the trustees to testify to the satisfaction that I know my client and those interested will feel, both as to the principles which have governed your honor, and as to the selection of names. I think I am not going too far to say that I am certain that the names will be received by those whom I represent with great satisfaction."

[1] The opinion of Judge Jenkins to which reference is made in the text and which is given in full in previous note may be considered in connection with his opinion in the case of Farmers' Loan and Trust Co. v. Northern Pacific Railroad Co. 61 Fed. R. 546, which was previously delivered upon a motion to remove Mr. Oakes, one of the receivers appointed by Judge Jenkins, and formerly an officer of the company. It was after the resignation of Messrs. Oakes, Payne and Rouse, arising from the conflict between the federal courts over the receivership proceedings affecting the Northern Pacific Railroad Co., that Judge Jenkins announced the views in the unreported opinion which we have given in full in note. The motion to remove Mr. Oakes was denied. We quote from the opinion concerning it as follows:

"The receiver should in a large sense be indifferent as between the various interests involved. He should have no

So very common has become the practice of both state and federal courts in appointing friendly receivers, that in a recent article in a law periodical the writer used these severe words in declaring against it: "It is a shame and disgrace to our judicial system, which countenances the office of the friendly receiver."[1]

The independent and aggressive action of Judge Jenkins in ignoring suggestions and requests of the parties in the Northern Pacific Railroad litigation to appoint as receivers of that company persons connected and identified with the management that wrecked it, is refreshing, and gives hope that the practice of appointing friendly receivers will cease.

In this connection we wish to call special attention to the selection by Mr. Justice Brewer, when circuit judge, of Messrs. Cross and Eddy, one a banker at Emporia, Kansas, the other a wholesale druggist of Leavenworth, Kansas, as receivers of the extensive railroad lines and property of the Missouri, Kansas and Texas Railroad Company. They were strangers to the company's business and financial trouble, yet their splendid administration of the receivership and marked suceess in wresting the company from financial chaos is unanswerable evidence against the policy and necessity of friendly receivers.[2]

Section 34. **Further of Friendly Receivers — Officers and Stockholders of Corporation.**— It is the exception rather than the rule that the property and business of a defendant corporation are

such personal interest as would interfere with an unbiased and impartial exercise of his duties as receiver. I quite agree with the doctrine that, in general, one who is a director or managing officer of a corporation at the time of its suspension ought not to be appointed its receiver. The rule, however, is not inflexible, and is necessarily departed from when it is apparent in view of the knowledge and familiarity of a particular person with the estate taken in charge by the court, that its best interests will be promoted by his appointment. This must, however, be understood as subject to the qualification that the integrity of the officer is above successful attack, and that the disaster of the corporation was not promoted by his reckless management. The case of a railway furnishes, perhaps, the most notable instance of the necessity of departure from the rule. * * * I fully agree with the observation of Judge Gresham in Atkins v. Railway Co. 29 Fed. R. 161, that 'receivers should be impartial between the parties in interest, and stockholders and directors should not be appointed receivers, unless the case is exceptional and very urgent.'"

[1] 1 Kansas City Bar Monthly, 9, 12.

[2] Mr. Cross was at the time of his appointment one of the directors of the railroad company, but only nominally such. He took no active part in the company's affairs, his name being used in the directory to comply with the requirement of the company's charter granted by the State of Kansas that three of the directors should be residents of that state.

of such nature and extent as to demand the selection as receiver of one of its stockholders or officers;[1] and when such is deemed necessary such person should be made an associate receiver and be in the minority. Thus alone will distrust and suspicion be suppressed and confidence and satisfaction assured.

In the recent litigation resulting from the financial difficulties of the whiskey trust, a friendly proceeding, stockholders of the company were made receivers, who were in every sense friendly receivers.[2] One of them was under contract to deliver fifteen thousand shares of the company's stock on the New York Stock Exchange, on demand, and was not the owner of any of it; but of this the court was not informed when making the appointment. A motion to remove the receiver, grounded on such fact, was sustained by Judge Grosscup of the federal court for the northern district of Illinois, and, among other things it was said: "Under such circumstances his acceptance of the receivership was simply an imposition upon the court. Indeed, I will knowingly accept no man as a receiver for any corporation who is, or who has been a speculator in its stocks. * * * The need of the day in corporate affairs is for managers who have an eye single to the interests of their trust. Such men will never be found as long as stockholders permit them to gamble upon their securities."

In commenting upon the selection of an officer of the corporation as receiver Judge Grosscup said in the same case: "I have never felt that an officer of a corporation, whose misfortunes instituted a receivership, should be ineligible to employment by the court; but this case convinces me that where the corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, a stockholder's appointment to a receivership should be preceded by a most careful and thorough scrutiny into his official and personal antecedents and interests."

In the receivership proceedings against the Washington and Columbia River Railway Company,[3] an officer of the company was appointed receiver, to whom objection was made, concerning which the court announced these views: "I concede that, when a court assumes control of the affairs of an insolvent corporation, it is pre-

[1] It has been judicially asserted that a man of integrity and good business ability is not disqualified as receiver of a railroad because he is not an expert in railroad affairs. Farmers' Loan & Trust Co. v. Cape Fear & Yadkin Valley Railroad Co. 62 Fed. R. 675.

[2] Olmstead v. Distilling and Cattle Feeding Co. 67 Fed. R. 24.

[3] Ralston v. Washington and Columbia River Railway Co. 65 Fed. R. 557.

ferable to take it entirely out of the hands of its managing officers. But there is no inflexible rule rendering such officer ineligible to appointment as receiver. I also assent to the proposition advanced by counsel for the interveners, that the rule of managing officers, whose mismanagement has resulted in bringing a corporation into a condition of insolvency should not be perpetuated by continuing them or their subservient agents in charge as receivers."

The motion to remove the receiver was overruled, the court being influenced in its ruling because of the provision in the mortgage empowering the trustee to choose the receiver, which authority the trustee had exercised, and the honesty and ability of the receiver, and his knowledge of the company's affairs. But there is much in the opinion of the court, as well as in that of Judge Grosscup, in the preceding case, that speaks strongly against friendly receivers.[1]

In the case of Atkins v. Wabash, St. Louis and Pacific Railway Company[2] Judge Gresham criticised the appointment by Mr. Justice Brewer, then circuit judge, of directors of the company as receivers in a proceeding instituted by the company, and without notice. "It is unusual and novel, to say the least," Judge Gresham said, "to entertain a bill filed by such a corporation against its creditors, and at once, without notice, place the property in the hands of one or more of the directors whose management has been unsuccessful. Receivers should be impartial between the parties in interest; and stockholders and directors of insolvent corporations should not be appointed, unless the case is exceptional and urgent, and then only on the consent of parties whose interests are to be intrusted to their charge."

Section 35. **Party to the Suit is Ineligible.**—In England a party to a cause cannot propose himself as a receiver without leave of court.[3] In a partnership suit relating to a colliery it was ordered that each of the partners who should show he was legally a partner, might have the liberty to propose himself or such other person, being a practical miner, as he should think fit to be appointed receiver.[4] In a similar case where there was no imputation of misconduct or suspicion of insolvency against the partners defendants, one of them, with the consent of the complainants, was made receiver, but without salary, and upon giving security for the man-

[1] See section 41 for further discussion of appointment of officers and stockholders of corporation as receivers.

[2] 29 Fed. R. 161.

[3] Davis v. The Duke of Marlborough, 2 Swanst, 118, 125; Cox v. Champneys, Jac. 576; Bunbury v. Winter, 2 Jac. & W. 255; Meaden v. Sealey, 6 Hare, 620; s. c., 18 L. J. (N. S.) Ch. 168.

[4] Jefferey v. Smith, 1 Jac. & W. 297.

agement, &c.[1] Ordinarily a party to the cause will not be appointed receiver without the consent of the other party, but exceptions are made in special cases, as in the settlement of certain partnership affairs.[2]

In a bankruptcy case, where there was a condition of a partnership that, upon one partner dying or becoming a bankrupt and indebted to the firm, then the surviving insolvent partners might deduct the deficiency from his share and also hold the stock, debts and property as their own, subject to payment and indemnity to executors, &c., or assignees; so that the partnership was not to end as to the survivors, a solvent partner was appointed receiver of the partnership property, but without a salary.[3] The court has given permission to a defendant heir at law to offer himself for receiver, but it thereby only put aside the disability under which a party ordinarily labors as to becoming the receiver in the cause.[4] When an action is brought to set aside an assignment for fraud, it is a strong reason against appointing a person receiver of the property assigned, that he was a party to the assignment.[5] But upon a proceeding in New York, under the revised statutes, for the voluntary dissolution of a corporation, the president of the company may be appointed a receiver, if not otherwise disqualified.[6] And a creditor may be appointed receiver of his debtor's property.

Section 36. **Eligibility of Relatives of the Parties to the Action and to Federal Judge.**—The fact that the person proposed for receiver, is related to either of the parties interested in the controversy, raises no presumption that he will be prejudiced in favor of such party, and is not of itself a disqualification; but it must be taken into account and given the same weight which experience in other associations teaches is proper and judicious. When in addition to such relationship there is a record of active participation in the controversy on behalf of any of the parties, he should be regarded as not sufficiently impartial and unbiased to act as receiver.[7]

[1] Wilson v. Greenwood, 1 Swanst. 483.

[2] Piano Company of Pennsylvania v. Charleston, Cincinnati & Chicago Railroad Co. 45 Fed. R. 436; *In re* Lloyd, L. R. 12 Ch. D. 447.

[3] *Ex parte* Stoveld, 1 Glyn & Jam. 307.

[4] Fingal v. Blake, 2 Moll. 50.

[5] Smith v. N. Y. Consolidated Stage Co. 18 Abb, Pr. 419; s. c., 28 How Pr. 208.

[6] Matter of Eagle Iron Works, 8 Paige, 385.

[7] Williamson v. Wilson, 1 Bland 418, where a person who was a brother of one of the parties and son of a creditor, and who was admitted to be a friend and agent of the plaintiff, was removed from his receivership.

The act of Congress of March 3d, 1887, contains this provision: "No person related to any justice or judge of the United States by affinity or consanguinity within the degree of first cousin, shall hereafter be appointed by such court or judge to, or employed by such court or judge in any office or duty in any court of which such justice may be a member." This provision includes the office of receiver.

Section 37. **Eligibility of Officers acting under the United States.**—From the principle involved in the English case of The Attorney-General *v.* Day,[1] where it was decided that a receiver-general of a county could not be a receiver in a cause, it is believed that no officer of the United States, who has given bond for the performance of his office and whose property, in case of malfeasance, could be swept from under him (by the United States having a preference), would be a fit subject for the situation of receiver. However, the question has never come before our courts.

Section 38. **The Rule as to Officials.**—In the older English cases the question of the eligibility of persons holding official positions under the court was often decided by determining whether or not such person would be likely to be called on to pass upon the receiver's accounts, it being a general rule that no person ought to control his own accounts.[2] On this principle it was held that a master in chancery could not be appointed receiver.[3] And the same reason has been assigned in this country for the exclusion of the same officer of court; and the appointment of such officer was held sufficient ground for reversing the decree.[4]

Section 39. **Eligibility of Solicitors and Legal Advisers.**—The same rule was applied where the person proposed as receiver was solicitor under a commission of lunacy;[5] and where he was solicitor in the cause.[6] In an important Illinois case, however, the exclusion of a legal adviser of the complainant from eligibility to act as a receiver in the cause was put on the broader ground of personal interest.[7] In this country also the objection has been extended to the

[1] 2 Madd. 246.

[2] Garland v. Garland, 2 Ves. 137.

[3] *Ex parte* Fletcher, 6 Ves. 427.

[4] Kilgore v. Hair, 19 S. C. 486; Benneson v. Bill, 62 Ill. 408. See section 40.

[5] *Ex parte* Pincke, 2 Meriv. 452.

[6] Garland v. Garland, 2 Ves. 137; Finance Company of Pennsylvania v. Charleston, Cincinnati & Chicago Railroad Co. 45 Fed. R. 436; Baker v. Administrator of Backus, 32 Ill. 79; Emons v. Davis & Dowd Pottery Co. 16 At. R. (N. J. Ch.) 157.

[7] Baker v. Administrator of Backus, 32 Ill. 79.

law partner of a solicitor in the cause; the reason being that he is as much interested in the result of the litigation as the solicitor himself.[1] The mere fact that a person is an attorney or solicitor is not of itself a disqualification.[2] If, however, a solicitor is appointed receiver, he cannot take part as solicitor in any of the proceedings it may be necessary for him to take as receiver.[3] Even with the consent of the parties the appointment of plaintiff's solicitor as receiver has been refused, it being said that "it is he who should keep watch upon the receiver, and see that he does his duty," and that the consent of the parties cannot make him capable of exercising two opposite functions.[4]

Section 40. **Eligibility of the Clerk of a Court.** — A clerk of a court, in the absence of statutory restriction, is not, in this country, disqualified to act as receiver, and the books afford instances of courts having so appointed their own clerks.[5] Under section 90 of the New York code of civil procedure, which provides that no person holding the office of clerk of a court of record within New York or Kings counties, shall be appointed a receiver except by the written consent of all the parties to the action, a failure to obtain such consent is a mere irregularity of which the plaintiff cannot avail himself in a collateral proceeding.[6] Where the offices of clerk of the court and master in chancery were held by the same person, and the court ordered that the receiver in a cause deliver over to the "clerk and master" the funds of the receivership, and that the clerk and master be appointed receiver, such order was held not to have the effect of making him the receiver, where nothing was done by him in that capacity, and no facts appeared from which his acceptance could be inferred.[7]

Section 41. **The Eligibility of Officers and Stockholders of Corporations.** — As to the eligibility of the officers and stockholders of corporations to be appointed receivers of the property of such corporations, a clear distinction is made between cases where the proceedings are compulsory, that is, where the application is made

[1] State Trust Co. v. National Land Improvement & Manufacturing Co. 72 Fed. R. 575; Merchant's &c. Nat. Bank v. Kent, 43 Mich. 292. Held in last case that the receiver would not be permitted to employ the solicitor in the case as his own counsel.

[2] Wilson v. Poe, 1 Hogan, 322. *Cf.* 2 Daniell's Chan. Prac. ch. 39, § 8.

[3] Ibid.

[4] Watson v. Arundel, Ir. R. 9 Eq. 324.

[5] Rogers v. Odorn, 86 N. C. 432; Waters v. Carroll, 9 Yerg. 102; Kerr v. Brandon, 84 N. C. 128; Hammer v. Kaufman, 39 Ill. 87.

[6] Moore v. Taylor, 40 Hun, 56 (1886).

[7] Waters v. Carroll, 9 Yerg. 102. See sec. 38.

by creditors, or other interested parties not immediately connected with them, and where the proceedings are instituted by the corporation itself, as for the purpose of winding up its affairs. It seems to be well settled that in compulsory proceedings, officers and stockholders of insolvent corporations should not be appointed receivers unless in exceptional and urgent cases; and then only by consent of the parties interested.[1] The reason assigned for their exclusion is that, having shown themselves by their want of success, unfit to manage the affairs of the corporation while solvent, they should not be trusted to manage them as receivers, even though they be officers of the court and acting under its orders.

In New York, on a proceeding against a bank, for the appointment of a receiver under the statute, on account of insolvency, an officer of the bank is not a proper person to be appointed receiver;[2] but otherwise, where the proceeding is for the voluntary dissolution of the corporation.[3] A stockholder of an insolvent corporation is not competent to act as its receiver, as the same person cannot be both complainant and respondent; and where the receivers have instituted a suit, the name of the one who is a stockholder may be stricken from the bill and the other receivers may proceed.[4] A trustee to whom a life insurance company had assigned its effects for the benefit of its creditors, was rejected for the appointment to the receivership, on the ground that the court would not be justified in allowing him to remain in the custody of the company's effects, and to administer them after he had been selected as trustee in the very deed in which the company avowed its insolvency.[5] As has been intimated above, in voluntary proceeding by a corporation for the appointment of a receiver, the officers or stockholders of such corporation may be appointed, if otherwise qualified.[6] A

[1] "Stockholders and directors of insolvent corporations should not be appointed receivers unless the case is exceptional and urgent, and then only on the consent of parties whose interests are to be intrusted to their charge." Atkins v. Wabash, St. L. & Pac. Ry. Co. 29 Fed. Rep. 161 (1886), Gresham, J.; Finance Company of Pennsylvania v. Charleston & Chicago Railroad Co. 45 Fed. R. 486. See also Buck v. Piedmont & Arlington Life Ins. Co. 4 Fed. Rep. 849; Baker v. Admr. of Backus, 32 Ill. 79; Freeholders v. State Bank, 28 N. J. Eq. 166; Atty. Genl. v. Bank of Columbia, 1 Paige, 511; McCollough v. Merchant's, &c. Co. 29 N. J. Eq. 217; People v. Third Avenue Savings Bank, 50 How. Pr. 22. Such officers were appointed receivers in *In re* Fifty Four First Mortgage Bonds, 15 S. C. 304. See also Gibbs v. Greenville & Columbia R. R. Co. 17 Id. 396.

[2] Attorney-General v. Bank of Columbia, 1 Paige, 511.

[3] Matter of Eagle Iron Works, 8 Paige, 385.

[4] Wiswell v. Starr, 48 Me. 401.

[5] Buck v. Piedmont & Arlington Life Ins. Co. 4 Fed. Rep. 849.

[6] Matter of Eagle Iron Works, 8 Paige, 385. In this case, however, the

stockholder and director in a banking corporation, which was the plaintiff in the action, has been regarded as disqualified to act as receiver for defendant in the case; but where the interest was not known to the court at the time of appointment, and he had entered upon his duties and had acted as receiver for several months, and no misconduct or impropriety was shown, he was not removed immediately, but the matter was referred back to the master, with liberty to propose the same receiver, and in the meantime the receiver was allowed to retain the custody and control of the property.[1]

Section 42. **A Corporation may be Appointed Receiver.**— A corporation may be appointed receiver and perform the duties of the office provided such power is conferred upon it by law. Trust companies are usually clothed with such power, and are now frequently appointed receivers. But the wisdom of such a selection is to be questioned. A receiver should be closer to and more readily subject to the order of the court than a corporation can possibly be.

Where a trust company, having been appointed receiver of a savings institution sued a bank on a claim of the institution which was in part disputed, and the trust company was afterwards appointed receiver of the bank also, it was held that the trust company might be the receiver of both; and as thus representing both debtor and creditor had a right to apply to the court for instructions.[2]

Section 43. **Eligibility of Trustees.**— The English courts have held with great uniformity that persons acting in the relation of trustees to the property which the receiver is to control, shall not be eligible to the appointment, the older cases giving the reasons that he is an accounting party,[3] and that, as a trustee receives no emolument, if appointed receiver he would be receiving it;[4] but to this rule there may plainly be exceptions and it must bend to circum-

proceeding was brought under a statute providing for the dissolution of corporations and reciting that the officers "may" be appointed receivers.

[1] Bank of Munroe v. Schermerhorn, Clarke's Chan. 366. See sections 33 and 34.

[2] *In re* Knickerbocker Bank, 19 Barb. 602. The trust company appointed in this case was specially created by the legislature, in part to aid suitor and the court by assuming the exercise of trusts when it might be difficult to get others to execute them, as here, on account of the largeness of the amount of security that would be required, and the difficulty of obtaining persons competent to give such security and to manage such affairs.

[3] Anonymous, 3 Ves. 516, where Lord Rosslyn said, "This person is an accounting party—a trustee; and he ought to check the receiver. He cannot be receiver."

[4] Blank v. Jolland, 8 Ves. 72; Sykes v. Hastings, 11 Ves. 363.

stances. Where an exception to it was made, the trustee was expressly prohibited from receiving emolument.[1] In the case last cited,[2] a broader reason for the exclusion of a trustee was hinted at by the chancellor, who said "the court appointing a receiver looks to the trustee to examine with an adverse eye, to see that the receiver does his duty," thus intimating what may now be considered the true reason for the ineligibility of trustees, &c., viz: adversity of interest.[3]

In a well-considered English case, in which a testator named as trustee and executor, a person who, for many years, had been the salaried manager of his estate, the tenant for life being an infant, the court continued the testamentary executor as receiver at a fixed salary.[4] Whether a trustee be a sole trustee or jointly with others, makes no difference in regard to his general ineligibility.[5] On the other hand it has been held to be improper for a United States court, under the bankrupt law, to appoint as trustee of the bankrupt's estate, a person who held the estate as receiver by appointment of a state court, where it appeared that he was appointed receiver in proceedings instituted with intent to defeat and delay the operation of the bankruptcy act.[6]

Section 44. **Eligibility of a Next Friend.**— In a similar manner is to be answered the question whether a next friend may be appointed receiver. In a suit in the name of infants, by a next friend, for an account against the defendants, as executors, although there was a consent that such next friend might act as receiver of the rents and profits of real estate, yet the court would not sanction it, saying: "It is the duty of the next friend of these infants to watch the accounts and conduct of the receiver—to be control over him. The two characters cannot be united; they are incompatible."[7] And the same reason for not appointing a next friend has been urged to exclude the son of a next friend. Lord Eldon, in a case of this kind, remarked: "The receiver who has been appointed is, I believe, a very respectable person; but the son of the next friend is not the person whom he is most likely to check and control."[8]

Section 45. **Eligibility of a Mortgagee.**— It seems that, in the English practice, a mortgagee of property could not be appointed

[1] Hibbert v. Jenkins. MS. quoted in Sykes v. Hastings, 11 Ves. 363.
[2] Hibbert v. Jenkins, *supra*.
[3] Sutton v. Jones, 15 Ves. 584.
[4] Newport v. Bury, 23 Beav. 30.
[5] Blank v. Jolland, 8 Ves. 72.
[6] Matter of Stuyvesant Bank, 5 Benedict, 566.
[7] Stone v. Wishart, 2 Madd. 64.
[8] Taylor v. Oldham, 1 Jac. 527.

receiver over it,[1] the reason assigned being that, if he were appointed upon a salary, he would then be getting more than legal interest; and if the court appointed him without remuneration, his course of policy might be an injury to the mortgagor.[2] But in a case in New York, in which a person who, by a decree of court, had been declared to be a mortgagee in possession and in effect a trustee of the equity of redemption, was appointed receiver also, it was held, on appeal, that, by accepting the receivership, he was deemed to have assumed its duties and responsibilities, unqualified and unmodified by the circumstance of his having been declared mortgagee in possession, or by the fact that he claimed that the decree was erroneous, and that he was and ought to be held to be the absolute owner; and it was further held that his relations, claims and interests as an individual must not be permitted to interfere with his duties as a receiver, or with the purpose or interest for which he was appointed.[3]

A mortgagee is not a disinterested and indifferent person, and therefore is not eligible for receiver.

Section 46. **Eligibility of an Administrator.** — Primarily the administrator of a deceased partner has nothing to do either with the partnership assets or the partnership debts, but, if there is unreasonable delay on the part of the surviving partnership, or if they are wasting the partnership property, such administrator, being otherwise competent and eligible, may be appointed receiver of the partership affairs.[4]

Section 47. **Of Eligibility in General.** — In general the court will be influenced in its selection of a receiver by considering his occupation and such other circumstances as may tend to restrict his capacity to give to his duties as receiver the requisite care and attention.

In a case where the receiver was a member of parliament and a barrister attending the court, and resided at a considerable distance from the estate of which he was the receiver, Lord Chancellor

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[1] Scott, *qui tam*, v. Brest, 2 Term R. 238; Chambers v. Goldwin, 9 Ves. 271; s. c., 1 Smith's R. 252; Lanstaffe v. Fenwicke, 10 Ves. 405. And see Bonithon v. Hockmore, 1 Vern. 316; French v, Baron, 2 Atk. 120; Carew v. Johnstone, 2 Sch. & Lef. 301; Scatterwood v. Harrison, Mos. 128; Davis v. Denby, 8 Madd. 170.

[2] *Contra*, Davis v. Barrett, 18 L. J. (N. S.) Ch. 304, a case of exceptional circumstances and doubtful authority.

[3] Bolles v. Duff, Receiver, etc. 54 Barb. 215.

[4] Miller v. Jones, 39 Ill. 54.

Eldon, considering an application to remove him, said: "The established practice presumes that a person shall be appointed to these duties, consistently with whose professional life so much time can be spared for the management of the estate as can be easily applied; and if a probable ground is laid that the requisite attention cannot be given, though I do not represent it as an absolute disqualification, such circumstances are to be regarded by the master in the appointment.[1]

In England a person will not be appointed receiver who is not subject to the ordinary process of commitment and to the same remedies as are available against a common citizen. A peer of the realm is not, therefore, competent to be appointed to the office.[2]

The nominee of one hostile party bitterly opposed by the other, should not be appointed, and if so should be removed.[3] So as to one having a direct interest in a lease of property to the defendant.[4]

It has been held that neither a non-resident nor a temporary resident is eligible for the office of receiver.[5] But the contrary has been asserted.[6]

A person originally selected and named as assignee of the same property under a general assignment, which was set aside for fraud, and who would have to account to himself, has been declared ineligible for receiver.[7]

A statute prohibiting the appointment of any "party or attorney, or other person interested in an action," as receiver, was held not violated by appointing one who had formerly been the receiver under an order which had been vacated.[8]

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[1] Wynne v. Lord Newborough, 15 Ves. 283.

[2] Attorney-General v. Gee, 2 Ves. & Bea. 208.

[3] Wood v. Oregon Development Co. 55 Fed R. 901.

[4] Etowah Mining Co. v. Wills Valley Mining & Mfg. Co. 17 So. R. (Ala.) 522.

[5] Chamberlain v. Greenleaf, 4 Abb. N. C. 92.

[6] Farmers' Loan and Trust Co. v. Cape Fear & Yadkin Valley Railroad Co. 62 Fed. R. 675.

[7] Eichberg v. Wickham, 21 N. Y. S. 647.

[8] Robinson v. Dickey (Ind.), 42 N. E. R. 685.

CHAPTER V.

THE PRINCIPLES ATTENDING THE APPOINTMENT OF RECEIVERS — OF WHAT AND UNDER WHAT CIRCUMSTANCES A RECEIVER WILL BE APPOINTED — TIME FOR THE APPLICATION.

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I.

THE PRINCIPLES ATTENDING THE APPOINTMENT OF RECEIVERS.

Section 48. **The Principles Attending the Appointment — Caution — Discretion — Statutory Proceedings.**— A receivership proceeding is an extraordinary remedy, and of such a harsh nature as to have been frequently denominated by the courts a drastic measure. It is necessary to its usefulness and value that the remedy be granted peremptorily and without a full hearing upon the merits of the controversy.

It follows logically and necessarily that the proceeding cannot be successfully invoked when another adequate remedy exists, and that the power to appoint a receiver and sequestrate property will be exercised with circumspectness and caution. There can be resort to the remedy only in "extreme cases," as the courts put it, and where it clearly appears that, without it, the complainant will sustain irreparable loss, and when it alone will prevent "manifest wrong imminently impending," and "only in cases of pressing apparent necessity."

It should appear that the plaintiff is quite clearly entitled to the interest he claims in the property for which a receiver is asked. Although that interest need not be conclusively shown to exist, yet the facts and proof in support of it ought to tend strongly to establish it. The averments ought to be positive, certain and consistent both as to the interest of the plaintiff in the property, and the circumstances of peril which invoke the remedy. The truth of the allegations upon which the relief depends must be established with reasonable certainty.

In determining the application the court will look to present conditions and what may be done in the future, rather than to what has been done in the past. Receivers are not appointed to punish past dereliction of duty or because of past dangers.

The power to appoint a receiver is generally called into exercise to prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction, and to secure the rights of the complainant.

In considering the appointment of a temporary receiver the court does not finally settle the questions raised by the pleadings, or the rights of the parties.

The application for the appointment of a receiver is always addressed to the sound discretion of the court. The appointment is not a matter of right. The power to appoint a receiver is a discretionary one, to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial. It is not to be too strictly limited, or too lightly and freely used.[1]

[1] The following cases support and elaborate the principles announced in the text: Cincinnati, Sandusky and Cleveland Railroad Co. v. Sloan, 31 Ohio St. 1; Crawford v. Rose, 39 Ga. 44; Connell v. Lawrance, 46 Kans. 83; Davis v. United States Electric Power & Light Co. 77 Md. 35; Mays v. Rose, Freeman (Miss.) 703; Whitehead v. Wooten, 43 Miss. 523; Hairup v. Winslet, 37 Ga. 655; Crane v. McCoy, 1 Bond, 422; Fluker v. Emporia City Railway Co. 48 Kans. 577; Fort Payne Furnace Co. v. Fort Payne Coal & Iron Co. 96 Ala. 472; Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Grevill v. Fleming, 2 Jo. Lat.

In determining an application for a receiver the averments of both the bill and the answer will be considered.[1] Where there is

335; Jenks v. Horton, 96 Mich. 13; Norris v. Lake, 89 Va. 513; Ruffner v. Mairs, 38 W. Va. 655; State of Maryland v. Northern Central Railway Co. 18 Md. 193; Tamlin v. Vanhorn, 77 Ga. 315; Baker v. Administrator of Backus, 32 Ill. 79; Sage v. Memphis & Little Rock Railroad Co. 125 U. S. 661; Semple v. Flynn, 10 St. R. 177; Jones v. Smith, 40 Fed. R. 314; Rapp v. Roehling, 122 Ind. 255; Beaumont v. Beaumont, 166 Pa. 615; Corbin v. Thompson (Ind. Sup. Ct.) 40 N. E. R. 533; Original Vienna Bakery, Coffee & Natatorium Co. v. Heissler, 50 Ill. App. 406; Cahn v. Johnson (Tex. Civ. Ct. App.) 33 S. W. R. 1000; Baltimore & Ohio Railroad Co. v. Cannon, 72 Md. 498; Moritz v. Miller, 87 Ala. 331; Chadron Banking Co. v. Mahoney, 43 Neb. 214; Pearce v. Jennings, 94 Ala. 524.

"The power of the court to appoint a receiver must be exercised with great caution, and with due regard to the rights and interests of all parties interested in the property. It is not to be allowed when other adequate remedy exists." Conwell v. Lowrance, 46 Kans., 83.

"The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule, such appointment will be made in all cases where the interests of parties seem to require it." Crane v. McCoy, 1 Bond, 422.

"The power of appointing a receiver is a discretionary one, to be exercised with great circumspection, and only in cases where there is fraud, spoliation or imminent danger of the loss of the property if the immediate possession should not be taken by the court; and such facts must be clearly proved." Davis v. United States Electric Power and Light Co. 77 Md. 35.

"The power of a court to appoint a receiver must be exercised with great care and the utmost caution, and with a due regard for the interests as well as the legal rights of all parties sharing in the property." The appointment of a receiver "is a matter resting largely in the discretion of the court." Fluker v. Emporia City Railway Co. 48 Kans. 577.

"The power to appoint receivers is, in all cases, exercised with great caution. There must be a legal or equitable right reasonably clear and free from doubt, attended with danger of loss." Fort Payne Furnace Co. v. Fort Payne Coal & Iron Co., 96 Ala. 472, 477.

"The authority * * * to appoint receivers should be used by a chancellor with great circumspection. Property is not taken from a party in possession, claiming in good faith the right to it, before judgments in actions at law, without first exacting from him at whose suit it is done ample security for the protection of his adversary against injury. Neither a writ in detinue, nor a writ of attachment for the seizure of property, can be obtained until the person suing it out shall execute an adequate bond, with good sureties, for the indemnification of the defendant against all loss he may thereby unjustly sustain. In courts of equity writs of injunction and equitable attachment are allowed only upon like conditions. * * * And whenever either of these writs will afford all needed protection to rights asserted by the plaintiff in a court of equity, and these rights are disputed, it should rarely appoint a receiver to take the property from the defendant; receivers being appointed ordinarily, without indemnifying bonds being required of those procuring the appointment to be made, and only upon the bond of the receiver with sureties

[1] Heflebower v. Buch, 64 Md. 15.

nothing more for the consideration of the court than the bill and answer, both verified, and the answer meets every material aver-

for his fidelity as such. There has been, indeed, too much facility on the part of chancellors and registers in the exercise of this authority." Briarfield Iron Works Co. v. Foster, 54 Ala. 622, 628.

"The appointment of a receiver is a harsh proceeding, and should be resorted to only in extreme cases." Jenks v. Horton, 96 Mich. 18.

"The appointment of a receiver is not a matter of right, but of discretion, to be governed by the circumstances of the case, one of which circumstances is the probability of the plaintiff being ultimately entitled to a decree. It is, moreover, a power always to be exercised with caution, and never excepting in a strong case. The general rule is to refuse an interlocutory application for a receiver, unless the plaintiff presents at least a *prima facie* case, and the court is satisfied that there is imminent danger of loss." Norris v. Lake, 89 Va. 513.

"The power to appoint a receiver is most usually called into action either to prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction." Baker v. Administrator of Backus, 32 Ill. 79.

"Where the rights of the plaintiff can be secured by some other measure less harsh than that of the appointment or continuance of a receiver, such other course must be pursued." Jones v. Smith, 40 Fed. R. 314.

"The appointment of a receiver rests in the sound discretion of the court, and in exercising such discretion it is governed by a view of the whole circumstances of the case. No positive or unvarying rule can be laid down as applicable to all cases. If there be no danger to the property, and nothing to show the necessity or expediency of appointing a receiver, none should be appointed." Beaumont v. Beaumont, 166 Pa. 615.

When by statute the appointment of a receiver is authorized under certain conditions, it is within the sound discretion of the court to make the appointment. Woodward v. Woodward (Ky. Ct. App.), 31 S. W. R. 734.

"The power of a court to appoint receivers is one of the highest and most unusual character vested in courts of chancery, and is never exercised only where justice would in all probability be defeated by witholding it." Corbin v. Thompson (Ind. Sup. Ct.), 40 N. E. R. 533.

"Courts do not appoint receivers as a punishment for past dereliction nor because of past dangers. Receivers are appointed because of present conditions and well founded apprehensions as to the future. Past conduct and past conditions may be taken into consideration in determining what the present situation is and the future will be, but a receiver will not be appointed because of things done or attempted at a past time, when the present situation and the prospects for the future are not such as to warrant taking the control of the property out of the hands of its owners." Original Vienna Bakery, Coffee & Natatorium Co. v. Heissler, 50 Ill. Ap. 406. There must be a present existing cause for the appointment of a receiver. Chadron Banking Co. v. Mahoney, 43 Neb. 214; Kean v. Colt, 5 N. J. E. 365.

"As a general rule a receiver should not be appointed unless the court is able to see some resultant benefit to the party seeking the relief, not otherwise obtainable, or that some injury, not otherwise avoidable, will ensue from the refusal; and only when necessity is shown." A receiver will not be appointed if there be any other safe or expedient remedy. Pearce v. Jennings, 94 Ala. 524.

"The existence of an adequate remedy at law is always a bar to the appointment of a receiver." Cohn v. Johnson, 33 S. W. R. 1000.

"It has been said that the exercise of

ment in the bill, the application will be denied, because the answer overcomes the equities of the bill.[1] This is but the application of

the power to appoint a receiver *pendente lite* is one of the most responsible duties which a court of equity is called on to perform, as its effect is to deprive the defendant of his possession before a final decree, which may work great, and even irreparable injury. * * * The appointment rests largely in the discretion of the court; not an arbitrary or capricious, but a judicial discretion, controlled by a consideration of the circumstances of each case; and the power should be exercised with great caution and circumspection. Actual fraud or imminent danger is not, in all cases, essential to the exercise of the power. There should, however, be a concurrence of two grounds: a reasonable probability of success on the part of the complainant, and that the subject matter in controversy is in danger. The remedy is preventive in its nature, and its purpose is the preservation of the subject-matter of litigation, for the benefit of all the parties in interest, until their rights can be finally adjudicated. It does not affect the title, nor establish the rights of the parties. Such being the nature of the remedy, the appointment of a receiver is authorized when the party seeking the appointment shows, *prima facie*, a title reasonably free from doubt, or a lien upon the subject-matter of controversy, to which he has a right to resort for the satisfaction of his claim, and that it is in danger of loss from waste, misconduct, or insolvency, if the defendant is permitted to retain the possession. Notice of the application for the appointment, and the officer to whom it will be permitted, must be given, or a good reason shown for the failure to give the same." Ashurst v. Lehman, 86 Ala. 370.

When fraud in a conveyance is relied upon in an application for a receiver, the question whether the deed is fraudulent belongs to the final hearing of the cause, and the alleged fraud will only be considered on the motion for a receiver as showing grounds for protecting the fund *pendente lite*. Rheinstein v. Bixby, 92 N. C. 307.

In appointing a temporary receiver the final rights of the parties are not adjudicated. Forsaith Machine Co. v. Hope Mills Lumber Co., 109 N. C. 576; Bank of Florence v. United States Savings and Loan Co. (Ala.), 16 So. R. 110.

"When an application is made for the appointment of a receiver the primary inquiry is whether there is shown a reasonable probability that the plaintiff seeking the appointment will ultimately succeed in obtaining the general relief sought by the suit. If ultimate success is a matter of grave doubt, or if * * * it be clear that the general relief sought cannot be obtained, the appointment ought not to be made. It is true, as a general rule, that, in making or refusing the appointment of a receiver the court will not forestall or anticipate the decision which may be made on final hearing. This is true when a case is presented upon which there is a reasonable probability the plaintiff may ultimately obtain relief. In such cases the pleadings may not be drawn with technical accuracy. The bill may be subject to demurrer for the want of proper parties, or because of defects of form or the absence of substantial allegations — insufficiencies curable by amendment. These insufficiencies, of themselves, do not form an impediment to the appointment of a receiver, if a case be made by a party having interests to be protected and preserved entitling him to the general relief which is prayed." Bank of Florence v. United States Savings and Loan Co. 16 So. R. 110 (Ala.).

For illustrations of the principles governing the appointment of receivers see sections 107 and 108.

[1] Crombie v. Order of Solon, 157 Pa. 588; White House v. Point Defiance,

the elementary rule imposing on the plaintiff the burden of proof, and the enforcement of the principle that a receiver will be appointed only when the circumstances which invoke the remedy are clearly, though not conclusively, shown to exist.

In a proceeding seeking the appointment of a receiver founded on statute, which provides for receivers in cases not within the inherent power of courts of equity, the statute will be strictly construed, and the allegations and proofs must clearly bring the proceeeding within the legislative enactment, and the power by it expressly conferred, or necessary to the effective exercise of such power. The statutory provisions must be strictly followed,[1] they being in derogation of the common law.

There must, of course, be a cause pending, and the remedy by appointment of a receiver can be successfully invoked only by one having some interest in the property against which the proceeding is directed.[2]

It is a self-evident proposition that if, for any reason, the court cannot grant the applicant any ultimate relief it has no power to appoint a receiver; for the appointment is incident and auxiliary to the suit in which ultimate relief can be granted.[3]

The appointment of a receiver may be made upon conditions imposed on the applicant. This is particularly true in receivership

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Tacoma & Edison Railway Co. 9 Wash. 558; San Antonio & Gulf Shore Railroad Co. v. Davis (Tex. Civ. App.), 30 S. W. R. 693.

[1] Lewis, *in re*, 52 Kans. 660; Vanderbilt v. Central Railroad of New Jersey, 43 N. J. E. 669; Chamberlain v. Rochester Seamless Paper Vessel Co., 7 Hun, 557; Von Glahn v. DeRosset, 81 N. C. 467; Mercantile Trust Co. v. Aetna Iron Works, 4 Ohio Cir. Ct. 579; Thompson v. Greeley, 107 Mo. 577.

When by statute the title to the property did not vest in the receiver until after he had qualified, it was held that he did not take the title at the time of the order making the appointment, as he would at common law. Chamberlain v. Rochester Seamless Paper Vessel Co. 7 Hun, 557.

Statute authorizing appointment of receiver must be valid, or the appointment made in pursuance of it will be void. Colwell v. Garfield National Bank, 119 N. Y. 408.

The dissolution of a corporation being wholly dependent on statute, in such a proceeding, where the legislative enactment authorized the appointment of a receiver only after final decree declaring the corporation dissolved, it was declared that the court had no power to appoint a receiver by interlocutory order. Mercantile Trust Co. v. Aetna Iron Works, 4 Ohio Cir. Ct. 579.

A statute will not be construed so as to authorize the appointment of a receiver in an ordinary action at law. Carter v. Hightower, 79 Tex. 135.

[2] O'Mahoney v. Belmont, 62 N. Y. 133, 143; Smith v. Wells, 20 How. Pr. 158. In a contest of a will under statute defining the issue, a receiver has been refused. Johnson v. Cochrane, 36 N. Y. S. 287. See section 51.

[3] People ex rel. v. Weizley (Ill.), 49 N. E. R. 300.

proceedings against railways, in the chapter upon which the question is considered.

Where the duties to be performed by the receiver are the same as those of a statutory officer, the latter will be appointed for the purpose of saving expense.[1]

Section 49. **It Should Not be Used to Work Injustice or to Injure Third Parties.** — It should not be used where its exercise would produce injustice or injury to private rights.[2] Where the granting of a receiver will injuriously affect the rights of third persons not parties to the record, which have intervened, as in case of innocent purchasers of property in litigation, the appointment will not be made, it being settled that the rights of such purchasers in good faith should not be passed upon and determined in so summary and indirect a method as a motion for an order to give possession to a receiver.[3] And where it is apparent that the appointment of a receiver will cause greater injury than would ensue from not interfering with its present possession, or if, for other reasons, the appointment will be inexpedient or improper, it will be refused.[4]

Section 50. **Consent of Parties Not of Itself Sufficient for Appointment.** — Consent of the parties before the court will not avail to secure resort to the remedy in a case otherwise improper, or if the rights of other persons will be affected adversely or put in danger of violation.[5]

Where an agreement made between parties interested in a will which was to be admitted to probate, provided for the collection of the rents and income of the real estate of the testator and that they "should be collected as the court shall direct," it was held subsequently, in a partition suit, that the appointment of a receiver was not only necessary, but that it entered into the expectation of the parties to the agreement.[6]

An application by one of the parties to an action for the appointment of a receiver before final judgment, founded only upon concurrent demands by both parties in their respective pleadings for such appointment, should not be granted.[7] As in other and more

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[1] British Linen Co. v. South American & Mexican Co. 1 Ch. L. R. (1894) 108.

[2] Frick J. in Speights v. Peters, 9 Gill. 474.

[3] Levi v. Karrick, 18 Iowa, 344.

[4] Vose v. Reed, 1 Woods, 647.

[5] Whelpley v. Erie Railway Co. 6 Blatchf. 271.

[6] Bowers v. Durant, 2 N. Y. State Reporter, 127 (N. Y. Sup. Court, 1886).

[7] Dusenbury v. Dusenbury, 11 Daly, 112 (New York C. P. 1882).

usual resorts to courts of equity, he who makes the application must come into court with clean hands.[1]

But consent or acquiesence in the appointment of a receiver renders it the law of the case as to the justice of the appointment.[2]

Section 51. **Necessity of a Pending Suit.** — The remedy by the appointment of a receiver is purely ancillary and auxiliary. It is a provisional and incidental remedy, and is not the ultimate object of the suit. It has been the universally accepted opinion, with but few exceptions, that courts have no inherent power to appoint receivers except as an incident to a pending action,[3] save in cases of idiots, lunatics and infants, which, as Lord Hardwicke said, "is a particular jurisdiction."[4]

There are authorities which have declared against the proposition asserted, where the proceedings were instituted and prosecuted by insolvent debtors, having for their sole object the appointment of receivers, that the debtors' property might be secured against disturbance by their creditors. In these exceptional cases the petitioners have been railroad corporations.

In the case of Brassey v. New York and New England Railroad Co.,[5] Judge Shipman said: "It is true that, in general, a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by a receivership, such relief must be refused because the time has not arrived when other substantial relief can be asked. * * * I am of the opinion that when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent, and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of the breaking up and destruction of its business, and confesses this inability, although no default has as yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where, upon a bill for an injunction against attacks upon the mortgaged property, and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed."

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[1] Hyde Park Gas Co. v. Kerber, 5 Bradw. 132.

[2] Post v. Dorr, 4 Edw. Ch. 412.

[3] Jones v. Bank of Leadville, 10 Colo. 464; State *ex rel.* Merriam v. Ross, 122 Mo. 435; Whitney v. Hanover National Bank, 15 So. R. 33; Merchants & Manufacturers National Bank of Detroit v. Kent, 43 Mich. 292.

[4] Whitfield, *ex parte*, 2 Atkins, 315.

[5] 19 Fed. R. 668.

This announcement has been accepted as supporting the proposition that receivers will be appointed on petition of an insolvent corporation.[1] But this has been denied.[2] The fact is the orator of the bill was an individual and was said to be the "actual owner of five mortgage bonds."

The subject of this section is a marked feature of the Wabash Railroad litigation, which was precipitated by the company filing its bill for the appointment of receivers against creditors, that it might be kept intact and the hands of its creditors stayed. The bill was presented to both Brewer, C. J., and Treat, D. J., the former, with the approval of the latter, granting the relief prayed for, and appointing Messrs. Humphreys and Tutt receivers.

This action of the judges named attracted the general attention of the public and the special interest of the profession, and received vigorous discussion.

The federal court for the northern district of Illinois took cognizance of a branch of the litigation on bill filed by holders of bonds secured by mortgage on part of the Wabash system in Illinois, and Judge Gresham characterized the action of Judges Brewer and Treat as "unusual and novel,"[3] which elicited from them a defense of their ruling;[4] Judge Treat denying the statement that he had first denied the application of the company and that it was subsequently granted by Judge Brewer, saying, "I did not refuse it; I simply suggested that it should come from the circuit judge."[5]

It was asserted by Judge Treat: "After full consideration I had no doubt that it was rightfully presented, and that an order should issue with respect thereto. I affirm, further, that since that time the supreme court of the United States has affirmed that doctrine. Now, if any one chooses to dispute that doctrine, that is a controversy between himself and the supreme court of the United States. We choose to rest on our original judgment, fortified by the decision of the supreme court of the United States."

No decision of the supreme court was cited, but the reference of Judge Treat could have been only to the decisions of that court in the cases of Quincy, Missouri and Pacific Railroad Company v.

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[1] Central Trust Co. of New York v. Wabash, St. Louis and Pacific Railway Co. 29 Fed. R. 618.

[2] State *ex rel.* Merriam v. Ross, 122 Mo. 435.

[3] Atkins v. Wabash, St. Louis & Pacific Railway Co. 29 Fed. R. 161, 178.

[4] Central Trust Co. of New York v. Wabash, St. Louis & Pacific Railway Co., 29 Fed. R. 618.

[5] Id., 628. For history of the Wabash receivership litigation, see further, Wabash, St. Louis & Pacific Railway Co. 22 Fed. R. 272.

Humphreys[1] and St. Joseph and St. Louis Railroad Company v. Humphreys,[2] in both of which the opinion of the court was delivered by Mr. Chief Justice Fuller. In the first of the cases cited it was said: "The bill was obviously framed upon the theory that an insolvent railroad corporation has a standing in a court of equity to surrender its property into the custody of the court, to be preserved and disposed of according to the rights of its various creditors, and, in the meantime, operated in the public interest. * * * The bill is characterized by one of the counsel as 'without precedent.' We are not called upon to inquire as to how that may be, but we readily agree that the concession to a mortgagor company of the power, through its own act to displace vested liens by unsecured claims is dangerous in the extreme. But no such concession was made here. * * * The theory of the bill and the action of the court and its officers left all the creditors with their rights existing as they existed before the appointment was made."

In the second case cited the Chief Justice only refers to the theory of the bill on which the receivers were appointed. In both cases there were in controversy the questions of priority and preference of liens and the liability of the receivers on leases executed by the insolvent company

These United States supreme court cases were cited by counsel in a contest before the supreme court of Missouri as to the validity of the appointment of receivers of a railroad company on its own petition.[3] A very elaborate and learned opinion adverse to the appointment was delivered for the court by Judge Brace.[4] Of the cases decided by the supreme court of the United States this was said: "The question of the validity of the appointment of the receivers was neither raised nor passed upon by the supreme court."

Certainly the assertion of Judge Treat, that the supreme court of the United States "has affirmed that doctrine," is not correct. The most that can be said is that the supreme court inferentially recognized "that doctrine." But this falls far short of an affirmance; it is not as forcible even as *obiter dictum.*

Upon the subject of this section the supreme court of Missouri, in the case cited, said: "The fact is the Wabash case is *sui generis.* There is no such source of equity jurisdiction as is supposed therein

[1] 145 U. S. 82.

[2] Id. 105.

[3] State *ex rel.* Merriam v. Ross, 122 Mo. 435. A proceeding in prohibition.

[4] Black, C. J., Sherwood and Macfarlane, JJ., concurring; Barclay, Gantt and Burgess, dissenting; but on technical objection to the use of the writ of prohibition, the dissenting judges not expressing any opinion upon the merits of the proceeding.

to have been discovered. It is without precedent and we have found no published case that supports it. * * * That a court of equity has no inherent power, except in some few cases of particular jurisdiction, to appoint a receiver, except as an incident to and in a suit pending, has hitherto, with the exception of the Wabash case, been a universally accepted doctrine; and, outside of that case, the doctrine that a court of equity, without statutory authority, has jurisdiction upon the application of an insolvent corporation to take charge of and administer its affairs through a receiver, not only has no support, but whenever suggested has been repudiated.[1] * * * The only precedent for the assertion or maintenance of the jurisdiction of the common pleas court is the case of the Wabash receivership, which is without precedent and ought to have no following. The exercise of such jurisdiction is not authorized by any statute of this state, and is not found within any source of equitable jurisdiction with which we are familiar, or of which the books speak; and, being without warrant of law, its further exercise ought to be prohibited."

The cases cited by Judge Brace in the opinion, and given in the last foot-note, support the proposition that a court of equity has no inherent power to appoint a receiver on the petition of an insolvent, to which other cases may be added.[2]

The doctrine asserted in the Wabash case has been followed in another federal circuit.[3]

Truly "the Wabash case is *sui generis*,"[4] "unusual and novel,"[5] and the "only authority" for the appointment of a receiver on the application of the insolvent.[6] The prudence and wisdom of the doctrine asserted in the Wabash litigation must be and was conceded by the supreme court of Missouri; but this, of course, does not create judicial power. The only foundation on which the doc-

[1] Citing the following cases: Jones v. Bank, 10 Colo. 464; French v. Bank Case, 53 Cal. 495; Smith v. Superior Court, 32 Pac. Rep. (Cal.) 322; State Bank of South Carolina v. McRea, Chase's Dec. 466; People *ex rel.* v. Judge, 31 Mich. 456; Kimball v. Goodburn, 32 Mich. 11; Neal v. Hill, 16 Cal. 145; French v. Gifford, 30 Io. 160; Whitehead v. Wooten, 43 Miss. 523; Attorney-General v. Insurance Co. 2 Johns. Ch. 370; *Ex parte* Whitfield, 2 Atk. 315.

[2] Merchants and Manufacturers' National Bank of Detroit v. Kent, 43 Mich. 292; Barber v. Manier, 71 Miss. 725: Pressly v. Harrison, 102 Ind. 14; Baker v. Administrator of Backus, 32 Ill. 79; Jones v. Schell, 45 Mich. 379; Hardy v. McClellan, 53 Miss. 507; Golding Hunter Mining & Smelting Co. v. Holleman, 27 Pac. R. 413; Guy v. Doak, 47 Kans. 236: McElheney v. Binz, 80 Tex. 1.

[3] Clarke v. Central Railroad & Banking Co. of Georgia, 54 Fed. R. 556.

[4] Brace, J., in State ex rel. Merriam v. Ross, 122 Mo. 435.

[5] Gresham, C. J., in Atkins v. Wabash, St. Louis & Pacific Railway Co. 29 Fed. R. 161.

[6] McElheney v. Binz, 80 Tex. 1; State ex rel. Merriam v. Ross, 122 Mo. 435.

trine can rest, even with plausibility, is the interest of the public, which can only be involved in corporations subject to receivership proceedings which are *quasi* public. Exclusive of this class of corporations the doctrine has no warrant whatever in law and is not to be countenanced.

The action of Brewer, C. J., and Treat, D. J., in granting the application of the Wabash Railroad Company, preventing the dismemberment of its system and shielding it from the ruinous attack of creditors, is not to be criticised and decried merely because it is "*sui generis*" and "unusual and novel." The law of receiverships is especially progressive. It grows with the coming of exigencies. Many of the principles concerning it, now well established and recognized, were, until but recently, "*sui generis*" and "unusual and novel." This is particularly true of the law relating to the receivership of railroad companies.

The doctrine of the Wabash case is contrary to the rule uniformly announced and followed by the state courts; but it may be correctly said to now be the rule of the federal courts, and may be considered as in force in that jurisdiction, until the supreme court of the United States shall directly declare against it; that court having to this time inferentially recognized the doctrine of that case.[1]

There is one phase of the subject that is beyond dispute; and we assert with the assurance of correctness that under no circumstances should an application by an insolvent corporation for the appointment of a receiver of its property be entertained without reasonable notice thereof to the mortgagees and other lien creditors, and then only with suspicious caution and scrutiny.

Section 52. **At what Time a Receiver may be Appointed.**—[2] The application and appointment of a receiver may be made at the time of filing the bill or any time thereafter during the pendency of the suit, and until its final disposition. The appointment may be made before as well as after answer;[3] and after final decree,[4] for the purpose of carrying it into effect; and after the taking of an ap-

[1] "There may be a pending action so as to authorize the appointment of a receiver although the notice or service is defective." Hellebush v. Blake, 119 Ind. 349. Where the record shows that a receiver was appointed on the same day the suit was commenced, it will be presumed that each was done in its proper order. Woods v. First National Bank of Greenleaf, 41 Kans. 475.

[2] See further as to subject of this section sections 116, 117.

[3] Vann v. Barnett, 2 Brown's Ch. 158; Baker v. Administrator of Backus. 32 Ill. 79.

[4] Garniss v. Superior Court of San Francisco, 88 Cal. 418; Sellers v. Stoffel (Sup. Ct. Ind.) 39 N. E. R. 52.

peal for the purpose of preserving the property while the appeal is pending; provided, the appeal is not made under conditions which stay all proceedings under the decree.[1] A receiver may be appointed after answer filed and before replication and proofs showing there is property to be seized.[2] It has been said that where the appointment is merely for an ancillary purpose the appointment may be made on the coming in of the answer; but that it is otherwise where the propriety of the appointment is the principle question in the case.[3]

A receiver may be appointed after an adjudication of bankruptcy and before the selection of the assignee for the temporary care and custody of the estate, when special circumstances exist justifying the appointment.

Section 53. **Application by Defendant.**— Formerly the rule, in general, was that a motion by a defendant for a receiver was irregular.[4] In New Jersey the chancellor refused to appoint a receiver of property in the hands of one of the defendants, on the application of a co-defendant, and assigned as reason for the refusal that there was no instance of a receiver having been appointed upon the application of a co-defendant against another defendant, before hearing.[5] And it is still held by that court that a receiver will not be appointed, as against a complainant, upon the application, of a defendant, except on cross-bill.[6]

In England the court cannot appoint a receiver on the application of a defendant even though the plaintiff not only refuses to make a motion for a receiver after filing his bill but also appears in opposition to the application of the defendant.[7] But in a case in Tennessee upon a bill by a second mortgagee for foreclosure, a defendant, who was a prior mortgagee, has been allowed a receiver against the mortgagor also joined as defendant.[8]

In North Carolina, under the provisions of its code,[9] a receiver has been appointed as against a plaintiff on the application of a defendant.[10]

A receiver may be appointed on the application of one defendant against a co-defendant.[11]

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[1] See sections 116 and 117. Garniss v. Superior Court, 88 Cal. 413.

[2] Dutton v. Thomas, 97 Mich. 93.

[3] Union Mutual Life Insurance Co. v. Union Mills Plaster Co. 37 Fed. R. 286.

[4] Robinson v. Hadley, 11 Beav. 614.

[5] Trumbull v. Gibbons and others (MS. 1819), Stewart's Digest (N. J.), 423, 428, 455. And see Robinson v. Hadley, 11 Beav. 614.

[6] Leddel v. Starr, 19 N. J. Eq. 159.

[7] Robinson v. Hadley, 11 Beav. 614.

[8] Henshaw v. Wells, 9 Humph. 568.

[9] Code of N. C. §§ 338, 339.

[10] Roper Lumber Co. v. Wallace, 93 N. C. 22 (1885).

[11] Henshaw v. Wells, 9 Humph. 568, See also, Smith v. Cornell 62 B. D. 75; Salt v. Cooper, 16 Ch. D. 544; Anglo-Italian Bank v. Davies, 9 Ch. D. 275.

II.

THE SUBJECT-MATTER OF RECEIVERSHIP.

Section 54. **The Subject-matter of Receivership Generally — Illustrations.**— It has been said that "every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into the possession of a receiver; and hence the appointment of such a person has been said to be an equitable execution."[1] The property must be of such a nature that a court can put its officer in possession of it. A mere license to occupy a stall in a market which is controlled by city authorities who have power to grant or withhold the license is not subject to a receivership.[2] In the same way the salary of a public officer cannot be the subject of a receivership when there is no permanent fund out of which it is payable, and where its payment is dependent upon the action of the legislature from year to year, and no action can be maintained to recover it or to enforce its payment.[3]

But a receiver may be appointed of the rents and profits of real estate, and also of personal estate where it is capable of being reduced into possession; and a receiver will be appointed, in the interest of equitable creditors, of all property against which a legal creditor might obtain execution.[4]

A receiver may be appointed by way of equitable execution over a civil service pension, payable monthly to the defendant, and by order, be directed to receive the monthly instalments and apply same to payment of a judgment.[5] In Mississippi[6] it has been held that an order appointing "was too broad in embracing the publication of a daily and weekly newspaper — rather a novel business for a chancery court to engage in." But the supreme court of Tennessee has correctly announced the contrary thus: "The general principle is settled both in this country and England that a receiver may be appointed to manage and conduct the publication of a newspaper."[7] But the court expressed approval of the announcement of Chancellor Walworth: "A court will not take upon itself the responsi-

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Contra, Trumbull v. Ogden, MS., Stewart's Dig. (N. J.) 455; Robinson v. Hadley, 11 Beav. 614.

[1] Jeremy's Eq. Jur. 248; Davis v. Duke of Marlborough, 1 Swanst. 83; s. c. 2 Id. 118, 127; Shakel v. Duke of Marlborough, 4 Madd. 463; Davis v. Uphill, 1 Swanst. 129, 132.

[2] Barry v. Kennedy, 11 Abb. Pr. (N. S.) 421.

[3] Cooper v. Reilly, 1 Russ. & M. 560, affirming s. c. 2 Sim. 560.

[4] Davis v. Duke of Marlborough, 1 Swanst. 83.

[5] Molony v. Cruise, 30 L. R. Ir. 99. But see section 56.

[6] Meridian News & Publishing Co. v. Diem & Wing Paper Co. 70 Miss. 695.

[7] Gwynne v. Memphis Appeal Avalanche Co. 93 Tenn. 603.

bility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property.

Section 55. **The English Practice Herein.**— In England a receiver has been appointed of the profits of a rectory under an *elegit*.[2] The appointment is not, however, confined to such property as is liable to be taken under an execution at law, but is extended to whatever is considered as assets in equity. Applying this principle the English courts have appointed a receiver for the office of a master-forester of a royal forest;[3] the office of clerk of the peace where its profits had been assigned for the benefit of creditors;[4] of a canonry,[5] a pension,[6] a college fellowship,[7] a manor,[8] heirlooms,[9] chattels,[10] of the tolls of a turnpike,[11] canal,[12] brewery,[13] railway,[14] market,[15] docks,[16] newspaper,[17] the freight of a ship,[18] and of funds in settlement.[19] But they have refused to appoint receiv-

[1] Martin v. Van Schaick, 4 Paige, 480.

[2] Silver v. Bishop of Norwich, 3 Swanst. 112, n.; White v. Bishop of Peterborough, 3 Swanst. 109. But it has also been held in England that a registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a receiver under the statute 1 & 2 Vic. ch. 110. Hawkins v. Gathercole, 6 De G. M. & G. 1; s. c. 1 Jur. (N. S.) 481, reversing s. c. 1 Sim. (N. S.) 63. See also Bates v. Brothers, 2 Sm. & G. 509.

[3] Blanchard v. Cawthorne, 4 Sim. 566.

[4] Palmar v. Vaughan, 3 Swanst. 173.

[5] Greenfel v. Dean of Windsor, 2 Beav. 544.

[6] Noad v. Backhouse, 2 Y. & C. Chan. 529.

[7] Feistel v. King's College, 10 Beav. 491, 509; s. c. 11 Jur. 506, 509. But see Berkeley v. King's College, 10 Beav. 602.

[8] Thelluson v. Woodford, 1 Seton 420, No. 24; Pym v. Pym, 1 Seton 420, No. 25.

[9] Earl of Shaftsbury v. Duke of Marlborough, 1 Seton 421, No. 27.

[10] Taylor v. Eckersley, L. R. 2 Ch. D. 302.

[11] Knapp v. Williams, 4 Ves. 430, n. (a); Dumville v. Ashbrooke, 3 Russ. 98, n.; Lord Crewe v. Edleston, 1 DeG. & J. 93; s. c. 3 Jur. (N. S.) 1061.

[12] Fripp v. Chard Ry. Co. 11 Hare 241; s. c. 17 Jur. 887; Potts v. Warwick, &c., Canal Co. Kay. 142, 143; Hopkins v. Worcester & B. Canal, L. R. 6 Eq. 437.

[13] Skip v. Harwood, 3 Atk, 564 (Reg. Lib. 1748, B. 517).

[14] Russell v. East Anglian Ry. Co. 3 McN. & G. 104; Furness v. Caterham Ry. Co. 25 Beav. 614; s. c. 4 Jur. (N. S.) 1213; Contract Corporation v. Tottenham & H. J. Ry. Co., W. N. (1868) 242; Marling v. Stonehouse & N. Ry. Co. W. N. (1869) 60; s. c. 17 W. R. 484; Kingston v. Cowbridge Ry. Co. 41 L. J. Ch. 152.

[15] DeWinton v. Mayor of Brecon, 26 Beav. 533; s. c. 5 Jur. (N. S.) 882.

[16] Ames v. Trustees of Birkenhead Docks, 20 Beav. 332; s. c. 1 Jur. (N. S.) 529; Postlethwaite v. Maryport Harbor Trustees, W. N. (1869) 37.

[17] Kelly v. Hutton, 17 W. R. 425.

[18] Roberts v. Roberts, 1 Seton 423, No. 33.

[19] Brown v. Walter, 1 Seton 421, No. 28.

ers of parochial rates, which were to be assessed and collected at a future time,[1] and of the rates of a municipal corporation pledged to secure the repayment by instalments, according to the directions of an act of Parliament, of money advanced.[2]

Section 56. **The English Practice as Affected by Considerations of Public Policy.**—On grounds of public policy the English courts have also refused an application for a receiver of the salary of an Assistant Parliamentary Counsel to the Treasury;[3] and on the same ground they have refused the similar remedy of sequestration of a pension for past services,[4] and of the half-pay of an officer of the army or navy.[5] So also in England, a receiver cannot, at the instance of a judgment creditor, be appointed in respect of a pension received by a retired officer in the Indian army for past services, such officer being prohibited by section 141 of the Army Act, 1881, from assigning or charging the pension.[6]

Section 57. **New York Decisions in Particular Cases.**—In New York it has been held that a subscriber to a given project from which he has withdrawn, may, in an action against the depositary of the funds subscribed, have a receiver for such fund appointed.[7]

The word "assets," as used in the provision of the act of New York of 1869 (§ 17, ch. 902, Laws of 1869) authorizing the court to appoint a "receiver of all the assets and credits" of a life insurance company, means all the property, real and personal, of such company, and the receiver upon his appointment becomes vested with the title to all of the property of the company, including its real estate, and no formal conveyance thereof to him is requisite.[8]

Section 58. **The Application for a Receiver Does Not Enlarge the Jurisdiction of the Court.**—The application for a receiver in a court of equity does not in any manner enlarge the jurisdiction of that court, as determined by long usage and well settled principles. As in ordinary cases it will not assume jurisdiction where courts of

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[1] Drewry v. Barnes, 3 Russ. 94.

[2] Preston v. Mayor of Yarmouth, W. N. (1872) 35; s. c. 20 W. R. 358.

[3] Cooper v. Reilly, 2 Sim. 560; s. c. affirmed 1 R. & M. 560.

[4] Lloyd v. Cheetham, 3 Giff. 171; s. c. 7 Jur. (N. S.) 1272.

[5] McCarthy v. Goold, 1 Ball & B. 387; Stone v. Lidderdale, 2 Anst. 533 (1795; Collyer v. Fallon, 1 T. & R. 459.

[6] Lucas v. Harris, 56 L. J. (Q. B. Div.) 15 (1886).

[7] Bailey v. O'Mahoney, 33 N. Y. Super. Ct. 239; O'Mahoney v. Belmont, 62 N. Y. 133.

[8] *In re* Attorney-General v. Atlantic Mutual Life Insurance Co. 100 N. Y. 279 (1885).

law have cognizance of the action, so it will not interfere in actions strictly at law, though the appointment of a receiver appeared to be advisable, unless by virtue of statutory authority.[1]

Following this principle a court of chancery has refused to appoint a receiver for the fees of an office claimed by different persons on the ground that by doing so it would in effect determine the right to the office, which could only be adjudicated properly by an information in the nature of a *quo warranto*.[2] But in cases where the right to an office is not involved, and the claim is merely as to the rights of the contending parties in the fees, as property, by virtue of a contract with the occupant of the office, the principle does not apply, and, if the case is a proper one in other respects for the appointment of a receiver, the appointment will be made.[3]

Section 59. **Growing Crops Considered Part of the Land and Subject to a Receivership.**— On granting an injunction to restrain, *pendente lite*, the sale of land on which stands a large crop of grain, it is proper to consider the crop a part of the land and to appoint a receiver to harvest and preserve it.[4] So, in a case where one hired a plantation for a year and the lessor, dissatisfied with the mismanagement and bad faith of the lessee, filed his bill and prayed an injunction to restrain him from carrying off the cotton made on the land, out of which the lessor was to have so many bales, and for the appointment of a receiver to enter upon and take possession of the land and the ungathered crop, etc., and the prayer was granted, it was held on appeal that the judgment appointing a receiver should be reversed, and the injunction be so modified as not to prohibit the lessee from carrying the cotton made on the land to any of the points specified in the contract for the purpose of delivering the same to the lessor.[5]

Section 60. **Particular Proof Required in Special Cases.**— The most convincing proof of the necessity for a receiver will be required in cases where the effect of the appointment will be seriously to affect family relations and domestic comfort, as where two minor children sought to have a receiver appointed over a homestead set

[1] By statute in Iowa, when the facts shown are such as to warrant it, a receiver may be appointed in an action at law. See Iowa Rev. Stat. (1868) § 3419, and Jones v. Graves, 20 Iowa, 596.

[2] Tappen v. Gray, 9 Paige, 507; Stone v. Wetmore. 42 Ga. 601.

[3] Palmer v. Vaughan, 3 Swanst. 173; Cheek v. Tilley, 31 Ind. 121.

[4] Corcoran v. Doll, 35 Cal. 476.

[5] Williams v. Green, 37 Ga. 37. See section 108.

apart at the instance of their deceased mother, and which was occupied by their aged father and his second wife and the minor children.[1]

Section 61. **The Possession and Location of the Property.**—Courts of equity may order receivers to take possession of property in controversy, whether in the immediate possession of defendant or his agent, and in proper cases they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver.[2] It is not necessary that the subject-matter of the litigation should be within the jurisdiction of the court, but the parties in interest must be subject to its jurisdiction. The English court of chancery has frequently appointed receivers over estates or property situated in foreign countries and in English colonies;[3] and has held that it is the better practice that the receiver himself should be within the jurisdiction of the court, and that he should be allowed to appoint his own agent in the foreign country for the management of the property there.[4]

In the United States the fact that the property over which a receiver is sought lies partly in one state and partly in another, as where a line of railway extends through two different states, the company being incorporated in both, will not prevent the courts of

[1] Barfield v. Barfield, 72 Ga. 668. In this case the court said: "It would require a very strong case indeed, supported by clear and convincing proofs from witnesses entitled to credit and uninfluenced by passion or prejudice, to authorize a court of equity to wrest from the father and head of a family the home in which for many years he had raised and sent out six adult children, and was still raising two others to the best of his ability, and place that home in the hands of a receiver, and thus break it up. * * * In case of insanity of the father, or such tyrannical and inhuman conduct as would lower him from the scale of manhood and sink him into a brute, equity might intervene with a remedy so harsh toward the old father of a family; but the facts herein disclosed do not approach such a case. * * * The appointment of a receiver prayed for would have shocked the conscience of civilization, and grieved to the core the heart of christianity."

[2] Matter of Cohen, 5 Cal. 494.

[3] Houlditch v. Marquis of Donegal, 8 Blight. (N. S.) 301; Barkley v. Lord Reay, 2 Hare, 308; Faulkner v. Daniel, 3 Hare, 204, n.; s. c. 1 Seton, 450; Langford v. Langford, 5 L. J. (N. S.) Ch. 60; Shepard v. Oxenford, 1 Kay & J. 491; Blank v. Lindsay, 15 Ves. 91; Logan v. Princess of Coorg. 1 Seton, 447, No. 1; Keys v. Keys, 1 Beav. 425; Tylee v. Tylee, cited, 1 Seton. 448; Hodson v. Watson, cited, 1 Seton, 448; Hinton v. Galli, 24 L. J. 121; s. c., 2 Eq. Rep. 479; Underwood v. Frost, 1 Seton, 448, No. 2; Porter v. Porter, 1 Seton, 449, No. 5; Bunbury v. Bunbury, 1 Beav. 318.

[4] Cockburn v. Raphael, 2 S. & S. 458; Blank v. Lindsey, 15 Ves. 91. In one case at least a person residing abroad has been appointed receiver. 1 Seton, 449, No. 5.

one of the states from appointing a receiver to take charge of the railway, in a case otherwise appropriate for the relief.[1]

Section 62. **Property Located Outside the Jurisdiction of the Court.** — Courts of equity will not, however, extend their extraordinary jurisdiction to property in a foreign country when the parties in interest in the property, or representing it, are not before the court or subject to its control.[2] Neither will a receiver be appointed as against a purchaser of the interest of one partner residing and conducting the business in another state.[3] It is, however, held that a court of chancery in one country may appoint a receiver in aid of the enforcement of a decree in chancery in a foreign country; but this will not be done where it is doubtful, upon the record, whether the plaintiffs will ultimately be entitled to a decree in the second action.[4]

Section 63. **The Effect of the Provisions of the New York Code upon Property Subject to a Receivership.** — Before the enactment of the New York code of civil procedure the appointment of a receiver of the property of a judgment creditor vested in him all the debtor's personal property without an assignment.[5] And since the code such appointment has the same effect upon the real property also;[6] but property of the judgment debtor which is, by statute, exempt from levy and sale by execution, is excepted from the operation of this rule.[7]

III.

In What Cases a Receiver will be Appointed.[8]

Section 64. **Insolvency as a Ground for Appointing a Receiver.** — Mere insolvency is not of itself a sufficient cause to warrant a court in taking the possession of the insolvent's property into

[1] State v. Northern Cent. R. R. Co. 18 Md. 193. But the right of the receiver outside the territorial jurisdiction of the court which appoints him rests upon the principle of comity between the states.

[2] Shaw v. Shore, 5 L. J. (N. S.) Ch. 79.

[3] State v. Northern Central R. R. Co. 18 Md. 193.

[4] Houlditch v. Marquis of Donegal, 8 Bligh. (N. S.), 301, and Beatty's Chan. (Irish) 146. See sections 683–691.

[5] Mann v. Pentz, 2 Sandf. Ch. 257; Wilson v. Allen, 6 Barb. 542.

[6] Porter v. Williams, 9 N. Y. 148; Code Civ. Proc. § 716.

[7] Hudson v. Plets, 11 Paige, 180; Andrews v. Rowan, 28 How. Prac. 126; Tillotson v. Woolcott, 48 N. Y. 190; Cooney v. Cooney, 65 Barb. 524; Code Civ. Proc. § 2463, which excepts also property held in trust proceeding from a person other than the judgment debtor; his earnings from personal services rendered within sixty days being necessary for the use of his family, etc.

[8] Professor Pomroy, in his elaborate and learned treatise upon equity juris-

its own hands by means of a receivership;[1] but where the case is otherwise proper for relief, it is an important factor in influencing the discretion of the court in making or refusing an appointment.[2] So a receiver has been appointed on an undisputed averment of insolvency, when there was a showing of danger of the misappropriation or waste of assets.[3] The cases in which insolvency figures as an element are so numerous that it is deemed best to consider it as it influences the decisions under the several heads hereafter treated.[4]

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prudence, describes four classes into which the cases may be divided in which a receiver may be appointed, as follows:

"The first class contains those cases where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding. * * * 1. Infants' estates. * * * 2. Lunatics' estates. * * * 3. Estates of decedents.

"The second class is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject matter of the controversy, but it is not just and proper, from the nature of the dispute and of their relations with each other, that either one of them should be allowed to retain possession and control during the litigation. * * * 1. Suits between partners. 2. In suits for partition between co-owners. * * * 3. In suits between conflicting claimants of land * * * a receiver will not ordinarily be appointed.

"The third class embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust and is violating his fiduciary duties by misusing, misapplying or wasting the property, and is thereby endangering the rights of other persons beneficially interested. * * * 1. Suits againsts trustees who have been guilty of a breach of trust. 2. Suits under like circumstances against executors or administrators. 3. Suits to enforce a mortgage when the security is inadequate, the mortgagor is insolvent, or is committing acts of waste and the like, depreciating the value of the property. 4. Suits under like circumstances to enforce equitable liens, including those by judgment creditors in the nature of an equitable execution. 5. Suits under like circumstances, and for a like reason by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession. 6. In suits by creditors, although not strictly creditor's actions by judgment creditors, brought to enforce their demands from the debtors' property, under some very special circumstances involving great danger of loss, such as the debtors' non-residence, insolvency and the like. 7. Suits for the rescission of a contract of the sale of land under special circumstances. 8. Suits to enforce payment of the arrears of annuities. 9. Suits for the protection of remaindermen against the life tenant or other holder of the particular estate. 10. Suits under many circumstances against corporations. 11. Suits and proceedings in bankruptcy.

"Fourth class. This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect." 3. Pomeroy's Equity Jurisprudence, 2d ed., sections 1332–1335.

[1] Gregory v. Gregory, 33 N. Y. Super. Ct. (1 J. & S.) 1, 39.

[2] Farmers' Loan & Trust Co. v. Chicago & C. R. R. Co. 27 Fed. Rep. 146.

[3] Turnbull v. Prentiss Lumber Co. 55 Mich. 387.

[4] See section 425.

Section 65. **Of property Over which Parties are Contesting in Probate Courts.** — In England, before the passage of the act of Parliament authorizing ecclesiastical courts to appoint an administrator, *pendente lite*, in cases litigating the probate of a will, the court of chancery frequently appointed receivers to take charge of the testator's property pending the litigation, in order that there might be some one to receive the assets and preserve them until the ecclesiastical court had determined the rights of the contending parties.[1] But it did so cautiously, having in view solely the preservation of the property. So it refused to appoint a receiver where the property was of small value, and was in possession of a person holding under the will;[2] and where it was held by one who claimed title adversely to both of two executors contesting under two different wills,[3] and where no danger to the property was shown.[4]

After the passage of the act referred to above, the court of chancery refused to exercise its power in such cases where an administrator, *pendente lite*, had been appointed under the act, so that a conflict between the courts might be avoided.[5] But it adhered to its custom and right where the ecclesiastical court neglected or refused to appoint such administrator.[6] After a verdict upon an issue *devisavit vel non* the court appointed a receiver against the party to whom possession of the estate had been given by the trustees of the legal estate under an order of court, though an order *nisi* had been obtained for a new trial.[7]

Section 66. **Maryland and New York Rules Herein.** — In Maryland the court of chancery has authority to protect the property of an intestate or testator by appointing a receiver pending a litigation in the orphan's court for probate or administration, and in such case the court proceeds upon the ground that the property is in danger, because it may get into the hands of those who have no interest in it, and it will not forbear to exercise its power to appoint a receiver, because the orphan's court may provide for the collection of the effects of the deceased by granting letters *pendente lite*;

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[1] Montgomery v. Clark, 2 Atk. 378; Marr v. Littlewood, 2 Myl. & Cr. 454; Watkins v. Brent. 1 Myl. & Cr. 97; Atkinson v. Henshaw, 2 Ves. & Bea. 85; Ball v. Oliver, 2 Ves. & Bea. 96; Parkin v. Seddons, L. R. 16 Eq. 34.

[2] Whitworth v. Whyddon, 2 Mac. & G. 52.

[3] Jones v. Goodrich. 10 Sim. 327.

[4] Richards v. Chave, 12 Ves. 462.

[5] Veret v. Duprez, L. R. 6 Eq. 329; Hitchen v. Birks, L. R. 10 Eq. 471; Knight v. Duplessis, 1 Ves. Sen. 324; Jones v. Frost, 3 Madd. 1.

[6] Parkins v. Seddons, L. R. 16 Eq. 34.

[7] Bainbrigge v. Bainbrigge, 3 Eng. Law & Eq. 86.

but it cannot appoint a receiver after the grant of letters *pendente lite* by the orphan's court, and if such receiver has been appointed prior to the grant, his powers cease after the grant, and he will be discharged and directed to deliver over the property to such administrator.[1]

In New York a surrogate, in case of a contest relative to the proof of a will or relative to granting letters testamentary or of administration with the will annexed, or of administration in case of intestacy, or when, by reason of the absence from the state of any executor named in a will, or for any other cause, a delay is necessarily produced in granting such letters, may, in his discretion, issue special letters of administration authorizing the preservation and collection of the goods, chattels, personal estate and debts of the deceased, and to secure the same at such reasonable expense as the surrogate shall allow, and for those purposes he may maintain suits as administrator.[2]

In England the institution of a suit to recall probate is not of itself a sufficient ground for appointing a receiver, even though the probate, issued in "common form" has been ordered into court and the parties directed to prove in the "solemn form."[3]

Section 67. **Of a Receiver as Against the Legal Estate or Party in Possession.** — The rule in ordinary cases is that a receiver will not be appointed where a defendant is in possession under a legal estate, and it is only departed from in cases of fraud clearly proved, or of imminent danger if the intermediate possession should not be taken under the care of the court, and there is strong ground of title in the claimant,[4] or where a person takes a conveyance of a legal estate subject to equitable interests, which he does not pay or keep down.[5] The possession must be such as will entitle the party to rents and profits.[6]

Where an heir-at-law applied for a receiver against a devisee the application was refused and the heir left to try the question at law

[1] *In re* Colvin, 3 Md. Ch. 278.

[2] N. Y. Code Civil Proc. §§ 2668–2672.

[3] Newton v. Ricketts, 10 Beav. 525.

[4] Lloyd v. Passingham, 19 Ves. 59; Mordaunt v. Hooker, 1 Amb. 311; Earl of Fingal v. Blake, 2 Moll. 50. See also Smith v. Smith, 2 Y. & Coll. 351; Silver v. Bishop of Norwich, 3 Swanst. 112, n.; Pignolet v. Bushe, 28 How. Pr. 9; Kipp v. Hanna, 2 Bland's Chan. 26.; Cole v. O'Neill, 3 Md. Ch. 174; Harrup v. Winslet, 37 Ga. 655; Thompson v. Diffenderfer, 1 Md. Ch. 489; West Chasten, 12 Fla. 315; *Ex parte* Walker, 25 Alabama, 81; Callanan v. Shaw, 19 Iowa. 183, 186; Guernsey v. Powers, 9 Hun, 78.

[5] Pritchard v. Fleetwood, 1 Meriv. 55.

[6] Archdeacon v. Bowes, 3 Anst. 752.

and recover on the strength of his own title. The court said: If, because there is a contest between the heir-at-law and devisee, the court should appoint a receiver, and this devisee has nothing to defend his title with, that may be a means to make an end of the case one way, but would introduce a precedent that might go a great way and have very fatal consequences as to devisees by stripping them of anything to defend their right."[1]

Section 68. **In Ejectment Cases, Fraudulent Conveyances, Etc.**—A court of equity will not appoint a receiver to hold land pending an action of ejectment for the recovery of the same where defendant in ejectment is a *bona fide* purchaser thereof.[2]

Where fraud in a conveyance is alleged as a basis for asking for a receiver the appointment will not be made unless it is manifest that the fund is in danger of being lost, or that insolvency of an unfit trustee is present or imminent.[3]

In Alabama a creditor by simple contract, being authorized by statute to file a bill to reach and subject property fraudulently conveyed by his debtor, acquires, by his bill and the service of process, such an interest and lien in and upon the property as entitles him to ask the appointment of a receiver.[4]

A receiver may be appointed, although the person applying has the legal estate as against the person whose possession he seeks to oust, where the property is in the nature of a trade.[5]

Section 69. **Of a Receivership where the Right is Doubtful.**—A receiver will not be appointed where the rights, as between the parties, are doubtful, if the defendant has obtained the legal estate without fraud and no case of danger as to his security is alleged. Accordingly in a case in which the plaintiff sued as heir, and the answer neither admitted nor denied that he held that character, a receiver was refused, and it was held that the defect in the answer was not a sufficient ground for refusing a receiver.[6]

When the plaintiff shows an equitable title to a part of the property in dispute and a legal and equitable title to another part, if the defendant makes out no title legal or equitable, and the preserva-

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[1] Knight v. Duplessis, 2 Ves. Sen. 360.

[2] Whitworth v. Wofferd, 73 Ga. 259.

[3] Rheinstein v. Bixby, 92 N. C. 307.

[4] Weis v. Goetter, Weil & Co. 72 Ala. 259.

[5] Fripp v. Chard Ry. Co. 21 Eng. Law & Eq. 53.

[6] Lancashire v. Lancashire, 9 Beav. 120; s. c., 15 L. J. (N. S.) Ch. 54; s. c., 9 Jur. 956. See also Whitworth v. Gangain, 1 Phill. 728; s. c., 3 Hare, 416; Metcalfe v. Pulvercroft, 1 Ves. & B. 180; Shakel v. Duke of Marlborough, 4 Madd. 463.

tion of the property requires the appointment of a receiver, one will be appointed.[1]

Where the heir, being in possession, was committing waste by cutting down timber, etc., and had waived an issue *devisavit vel non*, which, upon his application, had been ordered, and claimed that there was no effectual devise to disinherit him, the court being satisfied, upon the merits, that he was shut out from the inheritance, and, therefore, a trespasser, said: "If the inheritance fell upon the heir in the teeth of these devises, as I think no scintilla of it did fall upon him, I shall regret having ousted the heir from his possession; but, thinking as I do, I grant the receiver, with the observation that nothing done in this case by me goes to affect an heir-at-law from whom the testator has not taken away the legal estate."[2]

And where the ecclesiasical court had found against the will as a will of personal property, on the ground of the testator's insanity, and an issue of *devisavit vel non* on the same ground was to be tried, Lord Chancellor Lyndhurst said: "That question, however, has been already fully investigated, as far as regards the personal estate; and though the result is not conclusive as to the property now claimed by the plaintiff, the contest lay between the same parties, and the result of those proceedings were such as to furnish no reasonable ground for believing that the plaintiff will succeed when he brings the will before the proper tribunal on an issue at law. I would ask, besides, if the property is exposed to any danger in the meantime, while it remains in the possession of the defendants? The plaintiff is already bound to pay over a considerable sum to the defendants, under an order of this court; and so long, at least, as he retains that sum in his hands he has a sufficient security for the rents and profits should it ultimately appear that he is justly entitled. On both these grounds the motion must be refused, but without costs."[3]

Section 70. **The General Rule Herein in This Country.** — In this country a receiver will not generally be appointed against the legal title unless there is imminent danger to the property and the immediate rents and profits,[4] or when it is clearly proved that fraud or imminent danger would result if possession is not taken by the court.[5]

[1] Cole v. O'Neill, 8 Md. Ch. 174.

[2] The Earl of Fingal v. Blake, 2 Moll. 50.

[3] Clark v. Dew, 1 R. & Myl. 103.

[4] Kipp v. Hanna, 2 Bland's Chan. 26.

[5] Thompson v. Diffenderfer, 1 Md. Ch. 489.

A receiver will be appointed in behalf of a vendor, as against a vendee who has obtained possession and refuses to pay the purchase money.[1]

Section 71. **The New York Rule Herein.** — In New York the rule upon this point is well stated to be that "a court of equity generally refuses to interfere for or against the legal title, although in actions to set aside fraudulent conveyances, and in other equitable actions, receivers will be appointed when the safe disposition and management of the property require it. Even in an action to set aside a purchase on the ground of inadequacy of price, where the defendants were in possession and devisees of the purchaser, the Lord Chancellor appointed a receiver.[2] The power of the court in this respect is only limited by considerations of what is expedient for the interests of all concerned.[3]

In an equitable action for the partition of real estate, where the plaintiff showed good reason to believe that some portion of the property could not be rented, in consequence of the refusal of the defendant to unite with the other tenant in common, the plaintiff, and that the rents of other portions which had been rented could not be collected in consequence of her interference, a receiver was appointed to preserve the property from serious loss during the pendency of the action.[4] And in an action to recover the possession of real property, on the ground that judicial proceedings by which the title of the plaintiff's ancestor was apparently divested and the lands transferred to the defendant's ancestor, were void for fraud, mistake and want of jurisdiction, the court has power to appoint a receiver and grant an injunction to preserve the property and the proceeds of it pending the litigation.[5]

A receiver cannot be appointed in an action to recover possession of real property, unless some equitable grounds are made to appear entitling the plaintiff to the rents and profits as such, or unless their sequestration is necessary to his protection. A valid title in the plaintiff is essential, but not of itself sufficient to authorize the appointment.[6]

A plaintiff cannot demand the appointment of a receiver of property in which he has no interest.[7]

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[1] Payne v. Atterbury, Harring, Ch. (Mich.) 414.

[2] Citing Stillwell v. Watkins, 1 Jac. 280.

[3] Pignolet v. Bushe, 28 How. Pr. 9.

[4] Ibid.

[5] Rogers v. Marshall, 6 Abb. Pr. (N. S.) 457.

[6] People v. Mayor of New York, 10 Abb. Pr. 111.

[7] Smith v. Wells, 20 How. Pr. 158.

Section 72. **Other New York Cases to the Same Point.**—In an action to recover possession of real property, with damages for the wrongful withholding thereof, it is not regular or proper to appoint a receiver of the rents and profits of the property in controversy;[1] and a receiver will not be appointed over real estate before the hearing unless there is evidence of fraud in obtaining the possession, or special circumstances to show a necessity to preserve the property *pendente lite*.[2] In an action to recover possession of real estate from one in possession under a contract of sale a receiver will not be appointed *pendente lite*.[3]

A receiver may be appointed at the instance of a remainderman against a life tenant for failure to appropriate the rents and profits to keep down the taxes.[4]

Section 73. **Of a Receiver of the Rents and Profits of Real Estate.**—Courts are frequently asked to appoint receivers to take charge of the rents and profits of real estate pending suits to determine the ownership of the title or of other interests in it. Nothing can be clearer, both in law and in equity and from natural justice, than that a complainant is entitled to the rents and profits from the time his title accrued, where there are large outstanding encumbrances, and no part of the rents and profits is applied to keep down the interest, the defendant being totally irresponsible and holding over against his own deed. In such a case the complainant is entitled to a receiver.[5] The appointment will not, however, be made in such a case unless the plaintiff has established an apparent right to the property and the insolvency of the defendant is alleged and proved; nor will a receiver be appointed in a proceeding to establish a will.[6]

So it has been decided in Massachusetts, where writs of entry were brought to recover possession of certain parcels of land in possession of one who was in receipt of the rents and profits, both parties claiming under legal titles, and no claim being made of mismanagement or waste on the part of the party in possession, who was not insolvent, and there being no extraordinary danger that she would not be able to satisfy any judgments against her which the plaintiff might recover, that a bill in equity cannot be maintained

[1] Thompson v. Sherrard, 35 Barb. 593; s. c., 12 Abb. Pr. 427; s c., 22 How. Pr. 155.

[2] Willis v. Corlies, 2 Edw. Ch. 281.

[3] Guernsey v. Powers, 9 Hun, 78.

[4] King v. King, 41 N. Y. Super. Ct. (9 J. & S.) 516.

[5] Payne v. Atterbury, Harring. Ch. (Mich.) 414.

[6] Bryan v. Maring, 94 N. C. 694 (1886).

by the plaintiff for the appointment of a receiver of the rents and profits of the land pending the determination of the actions at law.[1]

Section 74. **Instances of the Appointment of Receivers, of Rents, Etc.**—Where one of two persons in whose name the title to real estate stands, but held for the benefit of both, is insolvent and is collecting the rents and profits and expending them in her own interest, it is a proper case for the appointment of a receiver.[2] In an action by a *cestui que trust* for an accounting, an order for an injunction and receiver may be granted, upon the finding that a trustee of real estate, a defendant in the case, is insolvent and has misapplied the rents and profits.[3]

Where a landlord brought an action against his tenant to recover possession of the premises leased, under a proviso in the lease for re-entry on breach of covenant, a receiver of the rents and profits of the land, pending the trial of the action, was appointed on application by the plaintiff.[4]

In New York a motion for a receiver should be granted where it is shown, upon the plaintiff's application therefor, that the defendants are irresponsible; that they are collecting rents which they are unable to refund, and which will probably be lost if they are not restrained; and that the premises are in a ruinous condition by reason of their neglect, and will continue to deteriorate.[5]

Under a statute of West Virginia, a judge of a circuit court ought not to appoint a receiver of real property or of the rents, issues or profits thereof, in vacation, but if he should do so an order should be made when the court is in session requiring such improperly appointed receiver to pay or pass over to the general receiver or to a special receiver appointed during the session of the court, all money or property in his hands.[6]

Section 75. **Of Inadequacy of Price as a Ground of the Appointment.** — A receiver will not ordinarily be appointed merely upon a charge of inadequacy of price. If allowed, it must be, where the inadequacy is so monstrous as to make it hardly possible that the transaction can stand. So in a case where an estate of the annual value of nearly two hundred pounds was sold by an ignorant,

[1] Squire v. Hewlett, 6 N. E. Rep. 779 (Mass. 1886).

[2] Roche v. Roche, 3 N. Y. State Reporter, 500 (N. Y. Sup. Ct. 1886).

[3] Albright v. Albright, 91 N. C. 220, 225.

[4] Gevatkin v. Bird, 52 L. J. (Q. B.) 263.

[5] Rogers v. Marshall, 6 Abb. Pr. (N. S.) 457, (N. Y. Super. Ct.).

[6] Kerr v. Hill, 27 W. Va. 577.

inexperienced person of weak intellect and addicted to intoxication, for a gross sum of two hundred and fifty pounds and an annuity of fifty-two pounds payable to his wife, Lord Chancellor Eldon allowed a receiver to be appointed, but said: "The point that struck me was, whether on a bill to impeach a sale for fraud, the court interposes so strongly before the hearing as to take away the possession from persons holding it under the effect of deeds not yet set aside by a decree of the court. I am ready to admit, that I do not remember any instance of a receiver being so appointed; but still the question is whether there may not be a case where it ought to be done. If the case stated be true, and it is more than probable that it is true, the inadequacy was so monstrous, the situation of the young man and the state of his intellect were such, that it is hardly possible to suppose that the transaction can stand; and I think, therefore, that this is a case where such an order may be made; though it is not the general habit of the court."[1]

Section 76. **Of a Corporation Acting as Trustee under an Original Grant.** — Where a corporation is trustee, whether for charitable or other purposes, and its rights arise from the original act or grant on which its authority, as trustee, rests, there the court cannot, without grave consideration, and will not, where the usual mode of dealing with the property has not been departed from, interfere with it by an interlocutory order for a receiver. This question came up before Lord Chancellor Cottenham and was so decided by him in a case in which, by a royal grant, a large tract of land was conveyed to an Irish society in trust for the benefit of twelve companies. An application for a receiver was made on the ground that there had been an appropriation of the rents and profits to certain local purposes, and that there had been a departure from the legitimate and proper conduct of the defendants as trustees, by an appropriation of certain portions of the income to themselves, in the shape of allowances for attendance and public dinners. There was, moreover, proof that, for one century at least, the society had been in the habit of making the payments complained of, all of which was known to the plaintiffs, and was a matter of notoriety long before the institution of the suit. His Lordship refused to appoint the receiver.[2]

Section 77. **Of a Receiver for an Estate in Trust.** — Ordinarily an application to have a receiver appointed for a trust estate will

[1] Stillwell v. Wilkins, 6 Madd. 49; s. c. on appeal, Jac. 280.

[2] Skinner's Company v. The Irish Society, 1 Myl. & Cr. 163.

not be granted while proceedings are pending for the removal of the trustees, unless a strong case be made out. It must appear that there is good reason to believe that the trust property will not be forthcoming to answer the decree in the premises at the end of the litigation;[1] but the action of the court in such a case is a matter of discretion.[2]

In Pennsylvania, where trust property consisting of coupon bonds, or other property not earmarked with the trust, is in the hands of a *de facto* trustee or custodian by the mere agreement of the *cestuis que trust*, and the latter become dissatisfied, and file a bill for account and distribution, the court will appoint a receiver, although no fraud or misconduct of the *de facto* custodian is established.[3]

If a trustee claims a growing crop of wheat, which in his absence another trustee takes possession of and commences cutting, the *cestui que trust* in the first deed may file a bill asking that the second trustee may be enjoined from selling the wheat, which he has cut, and for the appointment of a receiver and other appropriate relief.[4]

Section 78. **Of a Receiver Over an Executor — Estates of Decedents.**— It may be considered a rule that a receiver is not to be appointed over an executor upon slight grounds.[5] There ought to be strong and special reasons. There must be an abuse of the trust and danger of insolvency, existing or expected,[6] and manifest danger of irreparable loss.[7] Where no misapplication or abuse of trust is made out against an executor, the administration of the testator's property will not be taken out of his hands merely because he is poor, if this circumstance were known to the testator when he appointed him;[8] but on the other hand a receiver will be appointed where the person named as exeeutor is a bankrupt and the fact was not known to the testator.[9]

[1] Poythress v. Poythress, 16 Ga. 406.

[2] Janeway v. Green, 16 Abb. Pr. 215.

[3] Fidelity Ins. & Trust Co. v. Huber, 13 Phila. 52.

[4] Kerr v. Hill, 27 W. Va. 577.

[5] Courts of equity are cautious about appointing receivers to take charge of the assets of an estate in the hands of an administrator legally appointed. But if an administrator is seeking to administer property, the title of which clearly appears to be in another, then a receiver should be appointed, if the circumstances indicate that the rights of all the parties would thereby be more effectually and expeditiously protected and enforced. Hill v. Arnold, 79 Ga. 367.

[6] Middleton v. Dodswell, 13 Ves. 266.

[7] Werborn's Administrator v. Kahn, 93 Ala. 201.

[8] Howard v. Papera, 1 Madd. 142; Anonymous, 12 Ves. 4.

[9] Gladden v. Stoneman, 1 Madd. 143, n.

If, after an order on summons for the administration of a testator's estate, the sole executor and trustee has become bankrupt, a receiver ought to be appointed although the assignees are not before the court.[1] Where the person selected by the testator for his executor was an insolvent debtor at the date of the will, and was selected with a full knowledge that he was such insolvent debtor, the court will not, on that ground alone, interfere to take the property out of his hands.[2] Where, however, the executor becomes insolvent after his appointment, a receiver may be appointed.[3] A receiver will be appointed of an estate where the executor or administrator has been guilty of misconduct, waste or misuse of assets, and there is real danger of loss.[4]

Section 79. **Further of Estate of Decedents — Instances of Such Appointments.** — A receiver should be appointed to take the assets of an estate out of the hands of the legally appointed representative, only in case of manifest danger of loss, or destruction, or material injury to such assets.[5] Accordingly where an executor has, with an evidently fraudulent intent, conveyed property bought with the trust money of the estate, to a friend, and through him to the executor's wife, with the intention of preventing a levy upon it by a devisee for the amount of a decree in his favor, it is proper for the court to appoint a receiver to take it and sell it, and collect and invest the proceeds for the beneficiary, instead of merely directing the trustees so to do.[6] And where a bill is filed by the creditors of an estate against a person who has obtained possession of funds belonging to it, by representing himself to be the executor, and who is alleged to be insolvent, a receiver will be appointed.[7]

Where an intestate's partner was his administrator, and was charged with confusing the partnership property with his own and seeking to defraud those concerned in the intestate's estate, and the administrator died, and in his turn had an administrator who filed a bill for an accounting as between the several estates, and it did not appear that the partnership estate was being wasted or that there was any hindrance to the investigation of its affairs, and there was on the other hand evidence to the contrary, it was held that there was no ground for appointing a receiver over the deceased ad-

[1] *In re* Johnson, L. R. 1 Ch. 325.

[2] Stainton v. The Carron Company, 18 Beav. 161. And see Howard v. Papera, 1 Madd. 142; Gladden v. Stoneman, Ibid. 143, n., and Manners v. Furze, 11 Beav. 31.

[3] Scott v. Becher, 4 Price's Exch. 346.

[4] Harmon v. Wagener, 33 S. C. 487.

[5] Harrup v. Winslett, 37 Ga. 655; Randle v. Carter, 62 Ala. 95.

[6] Gunn v. Blair, 9 Wis. 352.

[7] *Ex parte* Walker 25 Ala. 81.

ministrator's property.[1] In England on a claim in the common form by the residuary legatee against executors for an account, a receiver was ordered at the hearing.[2]

A receiver of the assets of a decedent will be appointed if it appears that there is no executor or administrator with the right or power to act as such, though there is showing of improper conduct of the parties,[3] or that the estate is being wasted.[4]

Section 80. **Of a Receiver as Against a Tenant in Common — Partition.** It is not usual to grant a receiver against a tenant in common. Even in the case of an actual exclusion of one tenant in common by another, it is doubtful whether equity will appoint a receiver. In a case involving this question Vice Chancellor Leach said: "Exclusion is where one tenant in common receives the whole rent and excludes his companion from the share due to him. I may observe that, even in the case of an actual exclusion of one tenant in common by another, I doubt whether this court would appoint a receiver. If it were an exclusion which amounted to an ouster at law, the party complaining must assert at law his legal title. If it were not such an exclusion, this court would compel the tenant in common in receipt of the rents to account to his companion, but would not, I think, act against his legal title to possession; and the reason is because (*sic*) the party complaining may, at law, relieve himself by the writ of partition." [5]

In a later case, however, the court, under special circumstances, appointed a receiver of the rents and profits of the moiety of an estate.[6] Mere occupancy of the common property by a tenant in common under such circumstances that he is not liable to account, affords no ground for the appointment of a receiver pending an action for partition.[7] A receiver ought not to be appointed in a proceeding for the partition of property theretofore left in the hands of one of the parties to manage in the common interest, if there is no allegation against him of insolvency.[8]

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[1] Perrin v. Lepper, 56 Mich. 351.

[2] Bickford v. Chalker, 1 Eng. Law and Eq. 113. As to when an appointment of a receiver over property claimed by different parties in a probate court will be made see §§ 65, 66, *supra*.

[3] Flagler v. Blunt, 32 N. J. E. 518.

[4] Wells, *in re*, 45 Ch D. 1569.

[5] Tyson v. Fairclough, 2 Sim. & S. 142, distinguishing the cases of Evelyn v. Evelyn, 2 Dick, 800; Street v. Anderton, 4 Bro. C. C. 414, and Millbank v. Revett, 2 Meriv. 405, which seem to militate against the proposition stated in the text. See also Low v. Holmes, 17 N. J. Eq. 148; Blood v. Blood, 110 Mass. 545.

[6] Hargrave v. Hargrave, 9 Beav. 549.

[7] Varnum v. Leek, 65 Iowa, 751.

[8] Pierce v. Pierce, 55 Mich. 629.

In Georgia a court of equity has jurisdiction to appoint a receiver at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving all the rents and profits, and excluding such tenant from the receipt of any portion thereof, when such co-tenants are insolvent.[1]

The court has power to appoint a receiver in a partition suit, to lease the property while the suit is pending, to secure the rents and profits, and care for the premises.[2]

Section 81. **Of a Receiver as Against a Mortgagee in Possession.**— A receiver of chattel property held by a mortgagee in possession will not be appointed, except in cases of necessity, because possession after forfeiture constitutes the essential element of a chattel mortgage. It is the precise thing contracted for, the security on the faith of which the creditor usually makes his loan and without which he would have retained his funds in his own hands. To deprive him of it without just cause is to impair the obligations of a valid contract, a proceeding beyond the constitutional power of the court, as well of the legislature.[3] Where anything is due to a mortgagee in possession he will not be deprived of such possession by any appointment of a receiver; and such is the law even when the mortgagee, though he cannot state with any great precision what sum is due to him, can say, upon his oath, that he believes a sum of money is due and that his mortgage is not satisfied.[4]

Where the mortgagee in possession had put in an answer insisting that he had not been fully paid the court said: "Considering the question as between mortgagor and mortgagee, I do not know of any instance where a mortgagee in possession has said, by answer, that anything was due to him, that the court has tried, upon affidavits against the answer, whether that was true or not. In Beckford's case I said that, if he would swear sixpence was due, I would not appoint a receiver. * * * If it is not, therefore, clearly shown that the mortgagee is fully paid, and that almost by his own admission, this court will not deprive him of the possession. Beckford's case is the utmost length to which the court has ever gone, and in that case the mortgagee would not state that sixpence was due to him."[5]

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[1] Williams v. Jenkins, 11 Ga. 595.

[2] Weeks v. Weeks, 106 N. Y. 626; Goldberg v. Richards, 26 N. Y. S. 885.

[3] Patten v. The Accessory Transit Co., 4 Abb. Prac. 235, reversing s. c. 4 Id. 139.

[4] Quarrell v. Beckford, 13 Ves. 377; Rowe v. Wood, 2 Jac. & Walk. 553.

[5] Rowe v. Wood, 2 Jac. & Walk. 553.

Section 82. **Further as to Receiver as against Mortgagee in Possession.**— It may be gathered from the cases here cited and from other English cases that, if a mortgagee in possession declines to say whether there be anything due to him, a receiver can be appointed.[1] In a late case in New Jersey it was held that, where a mortgagee is in possession and there is no dispute as to the sum due him or as to the property, or any charge of waste, insolvency, mismanagement or wrongful conversion, a receivership will be refused; but where a creditor, having a right to redeem, has tendered the amount due and it has been refused and the property retained, a receiver may be appointed, with authority to take possession and sell the property.[2] As to the respective rights of a mortgagee having the legal estate and one holding an equitable mortgage, Lord Chancellor Eldon said: "The rule about receivers is very clear. A mortgagee, who has the legal estate, cannot have a receiver. An equitable mortgagee may, but he cannot if the first is in possession. I remember a case where it was much discussed whether the court would appoint a receiver, when it appeared by the bill that there was a prior mortgagee, who was not in possession. I have a note of that case. There Lord Thurlow made the appointment without prejudice to the first mortgagee's taking possession, and that was afterwards followed by Lord Kenyon.[3]

As between senior and junior mortgages this principle will not be applied in favor of the junior mortgagee when the senior mortgagee makes the application for a receiver.[4] If a prior mortgagee is not in possession, a subsequent mortgagee may have a receiver, without prejudice to the prior mortgagee's taking possession.[5]

Section 83. **Of the Rights of Other Creditors.**— The same principle applies to other equitable creditors and others having

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[1] Quarrell v. Beckford, 13 Ves. 377; Codrington v. Parker, 16 Ves. 469.

[2] Schultz v. Jerrord, 3 Atl. Rep 265; s. c., 2 Cent. Rep. 211 (N. J. Vice Ch. 1886).

[3] Berney v. Sewell, 1 Jac. & Walk 627; Quarrell v. Beckford, 13 Ves. 377. See also, Phipps v. Bishop of Bath and Wells, 2 Dick 608; Bryan v. Cormick, 1 Cox 423; Dalmer v. Dashwood, 2 Ib. 378; Price v. Williams, Coop. 31; Davis v. Greathed, 1 Jac. & Walk. 176; Newman v. Newman, MS. 2 Bro. C. C. 91 (Belt's Edit.), n. (7).

[4] Page v. The Marquis of Wellesley, 1 Hogan, 179; Hills v. Moore, 15 Beav. 175.

[5] Berney v. Sewell, 1 Jac. & Walk. 648, 649; Bryan v. Cormick, 1 Cox. 422; Norway v. Rowe, 19 Ves. 144, 153; Price v. Williams, Coop 31; Brooks v. Greathed, 1 Jac. & Walk. 176; Morgan v. Morgan, W. N. (1868) 227; Perry v. Oriental Hotel Co. L. R. 5, Ch. 420; Pease v. Fletcher, L. R. 1 Ch. D. 273.

As to receivers of mortgaged property generally see chapter 16.

equitable estates.[1] So a judgment creditor may have a receiver for lands of his debtor covered by a mortgage, but without prejudice to the prior encumbrancers or their possession.[2] In such a case the prior encumbrancer cannot object to the appointment unless by some act amounting to an assertion of his right and taking possession himself.[3]

A receiver may be appointed over the whole of a property at the instance of a mortgagee of an undivided share.[4] Where two parties have equally good claims against certain property not large enough to satisfy both, equity will appoint a receiver.[5]

Where a debtor in failing circumstances made a sale and transfer of all his property to his brother, a young man without family, experience or property resources, who was in his employment as clerk, for his individual notes, not endorsed, guaranteed or secured, and on the same day made an assignment of the notes in trust for the benefit of creditors, giving preference, it was held that the circumstances afforded sufficient evidence of a fraudulent intent to justify the appointment of a receiver.[6]

Section 84. **Of a Receiver of Mortgaged Property.** — A receiver of rents and profits ought not to be granted where the mortgage is not wholly due and where the mortgagee has neglected to take a pledge of the rents and profits of the whole premises to keep down the accruing interest in the meantime. It would be different if the whole mortgage money was due and the premises were not of sufficient value to pay the debt and costs. There the court might consider the complainants in equity as immediately entitled to the whole estate pledged as a security for the payment of such debt and costs, so as to authorize the appointment of a receiver of the rents and profits, in anticipation of a decree, at any time after the filing of the complainant's bill.[7]

On a motion to appoint a receiver pursuant to a covenant in a mortgage, it is no defence that the mortgage was given to secure advances for the erection of buildings, that such advances were not

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[1] Curling v. Marquis Townshend, 19 Ves. 628; Davis v. Duke of Marlborough, 2 Swanst. 137.

[2] Wells v. Kilpin, L. R. 18 Eq. 298, 300. See also, Smith v. Cowell, L. R. 6 Q. B. Div. 75; Salt v. Cooper, L. R. 16 Ch. D. 544.

[3] Silver v. Bishop of Norwich, 3 Swanst. 112, n. (*b*); Rhodes v. Lord Mostyn, 17 Jur. 1007; Wells v. Kilpin, L. R. 18 Eq. 298.

[4] Sumsion v. Crutwell, 31 W. R. 899.

[5] Hamberlain v. Marble, 24 Miss. 586.

[6] Litchfield v. Pelton, 6 Barb. 187.

[7] Bank of Ogdensburgh v. Arnold, 5 Paige, 38.

fully made, that the mortgagor had to advance a large sum to complete the buildings, and that, in order to save his credit, he had to sell them at a loss.[1]

In an action to foreclose, the purchaser of the equity of redemption, having knowledge of the mortgage and of the mortgagor s inability to pay it, may be required to surrender the possession to a receiver to collect the rents and profits for the benefit of the mortgagee, or to pay a reasonable rent to the receiver.[2]

A receiver will not be appointed on the application of a mortgagee for possession of mortgaged premises where it does not clearly appear that the premises are insufficient in value to pay the debt or that the court should take control of the estate to protect the rights of a party who has a clear, strong claim against it.[3] And in a proceeding to foreclose a mechanic's lien, the plaintiff cannot have a receiver of rents and profits appointed pending the suit.[4]

Section 85. **Where There is Already a Receiver — Extension.** — A receiver will not be appointed over the possession of another receiver, but the proper motion is that the receiver already appointed be extended to the cause in which it is sought to appoint a new receiver. And a defendant who appears on the motion and makes the objection may get the costs of his appearance, though in contempt.[5] Moreover, the fact that a receiver of the estate of a debtor has been already appointed is no answer to an application for a similar appointment in a subsequent suit by other parties, but the same receiver will be appointed in such subsequent suit.[6]

The extension is made subject to the legal and equitable claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receivership was granted and extended.[7] And the fact that a receiver of a judgment debtor's property has already been appointed in supplementary proceedings does not bar an application for a receiver in an action to reach the property of the debtor standing in his wife's name, nor in granting it, is it necessary that the same receiver be appointed.[8]

On motions to extend receivers the only persons entitled to be

[1] Mackellar v. Rogers, 52 N. Y. Super. Ct. 360.

[2] Mutual Life Ins. Co. v. Spicer, 12 Hun, 117.

[3] Callanan v. Shaw, 19 Iowa, 183.

[4] Meyer v. Seebald, 11 Abb. Prac (N. S.) 326, n., (N. Y. Com. Pleas).

As to receivers of mortgaged property generally, see chapter 16.

[5] Valle v. O'Reilly, 1 Hog. 199.

[6] Rogers v. De Forest, 7 Paige, 272.

[7] Howell v. Ripley, 10 Paige, 43.

[8] State Bank of Syracuse v. Gill, 23 Hun, 410.

heard are the petitioner and the debtor, and not the parties who have previously caused the appointment of the receiver.[1]

Section 86. **Of a Receiver for the Property of Corporations.**— The courts have not the power to appoint receivers to wind up the affairs of corporations in the absence of statutory provision.[2] But if the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, or mismanagement and waste, courts of equity have inherent power to appoint receivers.[3]

Section 87. **Of a Receiver in Case of Disagreement Among Corporate Officers.**—Where the governing body, owing to disputes, cannot properly conduct the business of a company a receiver may be appointed until a competent governing body is constituted.[4] And if the owners of a majority of the stock in a corporation neglect to elect officers, and it appear that there is no person authorized to conduct the affairs of the corporation, a receiver may be appointed, on the application of a stockholder, to preserve the corporate property.[5]

In New York, in cases where dissolution of certain corporations are decreed on petition of their managers, the court must appoint one or more receivers.[6] And as a general rule of law the fact that the stockholders of a corporation refuse to aid the company or advance means to relieve it from pecuniary embarrassments, even when called upon to do so, furnishes no ground for interfering with the corporate property by putting it in the hands of a receiver, since it was in the power of the trustees to sell out the stock of the delinquent holders.[7] When real estate in another state has been in the use of a New York corporation for a number of years and the situation of it, in reference to the legal title, has been the same during the whole time, and the company is in no more danger for the future, in reference to the title, than they have been during the time past, and no danger is alleged as to the responsibility of the

[1] Walsh v. Walsh, 11 Ir. Eq. 607.

[2] Stark v. Burke, 5 La. Ann. 740; Citizens' Bank v. Levee Co. 7 Id. 286.

[3] Haywood v. Lincoln Lumber Co. 64 Wis. 639, 645. See chapter 14. See sections 421, 422.

[4] Featherstone v. Cooke, L. R. 16 Eq. 298.

[5] Lawrence v. Greenwich Fire Ins. Co. 1 Paige, 587. As to suits by stockholders looking to the appointment of a receiver in such a case, see also Sheppard v. Oxenford, 1 Kay & J. 491; Evans v. Coventry, 5 De G., M. & G. 911.

[6] N. Y. Code Civil Proc. § 2429.

[7] Baker v. Admr. of Backus, 32 Ill. 79.

person in whom the legal title is vested, a receiver to take charge of it will not be appointed on the application of one who has been a stockholder of the corporation during the whole time.[1]

Section 88. **Of a Receiver in Case of Misconduct of Directors, Insolvency, etc.**—A receiver will not be appointed on a bill filed by one stockholder of a company against a director, to take charge of moneys alleged to have been improperly received and retained by such director, no apprehension of loss being alleged in the bill, and the answer alleging that the money was loaned to the director by the board of directors.[2]

The appointment of receivers does not follow as a matter of course upon a decree declaring a corporation insolvent, but rests in the discretion of the chancellor; though, generally, receivers will be appointed, unless it be shown to be for the interest of the creditors and stockholders to leave the directors in charge of the affairs. So where it appeared that the insolvency of a corporation had been long known to the directors, and that with such knowledge sales of its property had been made to them, to pay antecedent debts due to them, a receiver was appointed to investigate the legality of these sales, though the corporation appeared to have no property.[3] And in New Jersey it is no objection to the appointment that certain judgment creditors are proceeding, under the act of 1850, to "prevent fraudulent trusts and assignments;" or that the corporation has no property.[4]

Insolvency alone is not sufficient cause for the appointment of a receiver.[5]

Section 89. **Miscellaneous Decisions Concerning Receivers of Corporations.**— Under the Michigan act of June 21, 1837, the court has jurisdiction over banking corporations to restrain them by injunction from exercising their corporate powers, to appoint a receiver to take charge of their assets, and to decree their dissolution in the following cases: 1. When the corporation is insolvent. 2. When it refuses to pay its debts. 3. When it has violated any provision of its charter, or of any law binding on it.[6] A receiver and manager may be appointed of the property of a parliamentary cor-

[1] Hager v. Stevens, 6 N. J. Eq. 374. See chapter 14 as to the appointment of receivers of corporations.

[2] Ibid.

[3] Nicholas v. Perry, etc., Co. 11 N. J. Eq. 126.

[4] Ibid.

[5] See sections 64, 425.

[6] Attorney-General v. Oakland County Bank, Walk. (Mich.) 90.

poration, although, by the act, a committee was constituted, to whom all the powers of management were referred; but in a leading case it seems that the receiver was not empowered to manage.[1] The affairs of a club have been ordered to be wound up under the joint-stock companies winding-up acts.[2]

Section 90. **Of Receivers of the Property of Unincorporated Societies.**— Courts of equity have power to place the property of an unincorporated stock company in the hands of a receiver, order it to be sold and the proceeds to be divided among the members. but such power will not be exercised unless equity clearly require it, So where a bill was brought by a minority of the stockholders against the majority and the evidence failed to show that the property had been mismanaged or wasted the bill was dismissed.[3]

Where there was a schism in an unincorporated church society, and the trustees holding the real estate were equally divided, the application of one party for a receiver was denied, there being no charge in the bill of danger, fraud or irresponsibility.[4]

Section 91. **Of a Receiver of Partnership Property — Partnership not Dissolved.**— In partnership cases receivers are frequently appointed, but the action of the court upon application for them is largely influenced by the question whether the partnership is subsisting or has been dissolved. Where it is still subsisting a receiver will not be appointed unless special grounds are shown and it is clear that a judgment for dissolution must ultimately be given;[5] as where they have divested themselves to any extent of the right to wind up the affairs of the partnership or, by misconduct, the right of personal intervention is lost; and the funds put in danger.[6]

Where a firm has conveyed its property to a person as trustee for the payment of certain debts, a receiver may afterwards be appointed in a controversy as to the application of the proceeds of the property.[7]

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[1] Fripp v. Chard Railway Co. 21 Eng. Law and Eq. 53.

[2] *In re* St. James' Club, 7 Eng. Law and Eq. 140.

See chapter 14 as to receivers of corporations.

[3] Hinkley v. Blethen, 3 Atl. Rep. 655; s. c. 1 N. E. Rep. 794 (Sup. Ct. Me. 1886).

[4] Willis v. Corlies, 3 Edw. Ch. 281.

[5] Waters v. Taylor, 15 Ves. 10; Harrison v. Armitage, 4 Madd. 143; Goodman v. Whitcomb, 1 Jac. & Walk. 589, 599; Const v. Harris, T. & R. 496, 517; Smith v. Jeyes, 4 Beav. 503; Baxter v. West. 28 L. J. Ch. 169; Roberts v. Eberhardt, Kay, 148.

[6] Medwin v. Ditcham, W. N. (1882) 121.

[7] Naynor v. Sidener, 106 Ind. 179 (1885).

See chapter 17 as to receivers of partnerships.

Section 92. **In Case of Disagreement as to the Management of Partnership Property.**— A mere quarrel between partners is not sufficient; the winding up of the affairs of the concern must be endangered before a court will interfere by its receiver;[1] but where partners quarrel so that the business of the firm cannot be carried on and they institute cross suits in which both parties ask for a receiver, the court will make the appointment.[2] Mere disagreements of the parties as to the management of the property, furnish no ground for the appointment of a receiver. That can only be done as an incident to some relief falling within the jurisdiction of the court in relation to the contracts of the parties. The appointment of a receiver simply to manage the property is not within the power of a court of equity.[3]

Section 93. **In Case of the Withdrawal or Misconduct of a Partner.**—The refusal of one partner to assist in the management of the affairs of the partnership will not suffice;[4] but if one partner, by reason of his misconduct, can no longer be trusted, a receiver will be appointed; as where he colludes with the debtors of the firm for delay in paying their debts,[5] or carries on trade on his own account with partnership property;[6] or runs away in order to use the partnership property in a foreign country;[7] or if a surviving partner carry on the business with the assets of the deceased partner;[8] or if by mismanagement the whole concern be endangered;[9] or if he have made away with part of the firm assets;[10] or if he wrongfully exclude his partner from the management even though the partnership assets are not endangered;[11] but the dissolution caused by the refusal of an appointee under a will to become a partner does not constitute a dissolution arising from his exclusion

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[1] Texeire v. Da Costa, Cooke's MSS. (Nov. 1815); Hale v. Hale, 4 Beav. 369; Kelly v. Hutton, 17 W. R. 425.

[2] Williams v. Wilson, 4 Sandf. Ch. 379; Pratt v. Underwood, 4 Browne Civil Proc. Rep. (N. Y.) 167.

[3] American Loan & Trust Co. v. Toledo, C. & S. Ry. Co. 29 Fed. Rep. 416. (Dec. 1886).

[4] Roberts v. Eberhardt, Kay, 148; Rowe v. Wood, 2 Jac. & Walk. 556.

[5] Estwick v. Cunningsby, 1 Vern. 118 (1682); Speights v. Peters, 9 Gill. 472.

[6] Harding v. Glover, 18 Ves, 281.

[7] Sheppard v. Oxenford, 1 Kay & J. 491.

[8] Madgwick v. Wimble, 6 Beav. 405.

[9] De Tastet v. Bordieu, 2 Bro. C. C. 272, n. But see Const v. Harris, T. & R. 496, 524.

[10] Evans v. Coventry, 5 De G. M. & G. 911.

[11] Wilson v. Greenwood, 1 Swanst. 481. See also Peacock v. Peacock, 16 Ves. 49; Milbank v. Reavett, 2 Meriv. 405; Goodman v. Whitcomb, 1 Jac. & Walk. 589; Blakeney v. Dufaur, 15 Beav. 40; Clegg v. Fishwick, 1 McN. & G. 294, 298; Speights v. Peters, 9 Gill. 472.

by the surviving partners, and is no foundation for a receiver.[1] Where the partnership was originally formed, upon the false and fraudulent representations of one of the partners, a receiver was appointed at the suit of the other.[2]

Section 94. **When the Partnership is Dissolved or Dissolution is Disputed.**—Where the partnership is already dissolved, the appointment will readily be made.[3] If the dissolution be disputed the court will not, in general, grant a receiver.[4] Notwithstanding that articles of dissolution vest the right to wind up partnership affairs in one or more of the partners, a receiver may be appointed: (*a*) at the instance of one of the other partners where the partners vested with such right violate the agreement of dissolution; (*b*) at the instance of a partner who is denied rights secured to him by the articles of dissolution, as *e. g.*, access to the books; (*c*) when the state of feeling between the partners is such that the rights of supervision, of one or more, cannot be exercised without great unpleasantness and embarrassment.[5]

If the object be to continue the partnership and not to dissolve it, the general rule is not to appoint a receiver;[6] but if the object be to compel the observance of partnership agreements, the property will be given over to the care of a receiver *pendente lite*.[7]

Section 95. **In Case of Dissolution by Limitation—Sale of Partner's Interest.**—Where a partnership has expired by limitation and neither party desire to continue the business, a receiver will not be appointed on the application of one, unless mismanagement or improper conduct by the other is shown.[8]

In an equitable action by the purchaser of the interest of a partner in a firm, to recover it from fraudulent vendees of a judgment creditor who had fraudulently acquired the partnership property under execution sale, the action being to set aside such execution sale and to sell the property for the benefit of the plaintiff, the

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[1] Kershaw v. Matthews, 2 Russ. 62.

[2] *Ex parte* Broome, 1 Rose, 69.

[3] Sargeant v. Reed, 1 Ch. D. 600; Harding v. Glover, 18 Ves. 281; Estwick v. Cunningsby, 1 Vern. 118; Smith v. Jeyes, 4 Beav. 503; Speights v. Peters, 9 Gill, 472.

[4] Fairburn v. Pearson, 2 McN. & G. 144; Peacock v. Peacock, 16 Ves. 49.

[5] White v. Colfax, 33 N. Y. Super. Ct. (1 J. & S.) 297.

[6] Hall v. Hall, 3 McN. & G. 79, 88; s. c., 12 Beav. 419, n.; Roberts v. Eberhardt, Kay, 148.

[7] Const v. Harris, T. & R. 496; Morris v. Colman, 18 Ves. 437; Waters v. Taylor, 15 Ves. 10; Hall v. Hall, 3 McN. & G. 79, 91; s. c., 12 Beav. 414, 419, n.

[8] Bufkin v. Boyce, 104 Ind. 53.

court has no power to appoint a receiver to make such sale and settlement, the other partner not being made a party to the suit.[1]

Section 96. **In Case of Dissolution by Death.**—The same rules apply in general to cases between the representative of a deceased partner and the surviving partner.[2] A receiver may be appointed by the court notwithstanding the death of one partner and the appointment of an executor to administer his estate.[3] But a surviving partner, having the legal right to the possession of partnership property, will not be deprived of that right unless upon proof of mismanagement or danger to the partnership effects.[4] The court has the power of appointing a receiver to carry on a business, and will exercise it upon proper occasions;[5] and where all the partners are dead and the suit is between their representatives, a receiver will be appointed as of course,[6] so also when one partner becomes bankrupt, the suit being by the solvent partner against the assignee.[7]

Section 97. **In Case of a Foreign Partnership.**— The property of a foreign partnership which is being wound up in the country where its business was carried on, will not be placed in the hands of a receiver unless special danger to it be shown.[8]

Section 98. **Of a Receiver to Enforce Specific Performance and Rescission.**— In actions for the specific performance of contracts, receivers may be appointed whenever necessary for the preservation of the subject-matter of the contract.[9]

Where a vendor of land brought suit for specific performance, and it appeared that the vendee was allowing the property of which he was in possession to go to waste, and for this reason that it had already become an insufficient security for the price outstanding, and that the bargainer had made reasonable propositions for a res-

[1] Morrison v. Van Benthuysen, 9 N. E. Rep. 180 (1886).

[2] De Tastet v. Bordieu, 2 Bro. C. C. 272, n. See also Madgwick v. Wimble, 6 Beav. 495; Clegg v. Fishwick, 1 McN. & G. 294, 298; Davis v. Amer, 8 Drew. 64.

[3] Helme v. Littlejohn, 12 La Ann. 298.

[4] Connor v. Allen, Harring. Ch. (Mich.) 371.

[5] Smith v. New York Consolidated Stage Co. 18 Abb. Pr. 419; s. c., 28 How. Pr. 377.

[6] Phillips v. Atkinson, 2 Bro. C. C. 272.

[7] Freeman v. Stansfield, 2 Sm. & G. 479; s. c., 1 Jur. (N. S.) 8; Wilson v. Greenwood, 1 Swanst. 471, 482; Fraser v. Kershaw, 2 Kay & J. 496.

[8] Law v. Garratt, L. R. 8 Ch. D. 26.

[9] Boehm v. Wood, 2 Jac. & Walk. 236; Reade v. Hamlin, Phillips (North Car.) Eq. 128; Taylor v. Eckersley, 2 Ch. D. 302; Hyde v. Warden, 1 Exch. D. 309.

cission of the contract and an arbitration of differences, a receiver was appointed.[1] A receiver may also be appointed in an action for the rescission of an agreement.[2]

Section 99. **Of the Continuance of the Receivership.** — A receivership may be continued although the original reasons for the appointment have been removed, when those causes have produced new ones sufficient to call for an appointment, which have not been and cannot be removed.[3]

Section 100. **Ruling Upon a Rhode Island Statute Assignment.** — Under the statute of Rhode Island permitting debtors to suspend attachments by making assignments, the making of an assignment which did not purport to create illegal preferences, but which was adjudged void and fraudulent as against creditors, is not such an act or omission to act as will justify the court in appointing a receiver of the insolvent assignor's estate, although by such assignment the assignor has disabled himself from vacating attachments laid upon the assigned property after the assignment, as he otherwise might have done under the statute.[4]

Section 101. **Ruling Under the Provisions of the North Carolina Code.** — By the North Carolina Code equitable relief may be granted in every civil action where it is properly made to appear that any of the parties are entitled to it, and the powers of the court have been enlarged as to the remedies by injunction and appointment of receivers by the provisions of sections 338 and 379. So where, in an action to recover land, the defendant, being enjoined from cutting and removing timber, filed his answer denying the plaintiff's title and averring title in himself, and alleged that the plaintiff was cutting and carrying away timber, the court required the plaintiffs to give a bond to answer the defendant in damages, and appointed a receiver to take accounts of the timber cut and removed by the plaintiffs until the cause could be heard on its merits, and this notwithstanding the fact that the plaintiffs were solvent.[5]

Section 102. **Provisions of the New York Code.** — The code of civil procedure of New York, section 713, provides that, "In addition to the cases where the appointment of a receiver is specially

[1] Reade v. Hamlin, Phillips (North Car.) Eq. 128.

[2] Gibbs v. David, L. R. 20 Eq. 373.

[3] White v. Colfax, 33 N. Y. Super. Ct. (1 J. & S.) 297.

[4] Bank of America, Petitioner, 13 R. I. 176.

[5] Roper Lumber Co. v. Wallace, 93 N. C. 22.

provided for by law, a receiver of property which is the subject of an action in the supreme court, a superior city court or a county court, may be appointed by the court in either of the following cases:

"I. Before final judgment, on the application of a party who establishes an apparent right to or interest in the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured or destroyed.

"II. By or after the final judgment to carry the judgment into effect, or to dispose of the property according to its directions.

"III. After final judgment to preserve the property during the pendency of an appeal.

"The word 'property,' as used in this section, includes the rents, profits or other income, and the increase of real or personal property."[1]

Section 103. **Decisions Under Section 713 of the New York Code.** — Under this section the courts of New York have decided that the very general language of the section should be construed with reference to the familiar and well settled doctrines of law which existed before the enactment;[2] that the provisions of this section have not changed the practice that an equitable action cannot be upheld on the ground that a receiver is necessary to preserve property from misappropriation or waste pending litigation, and that it has not established any new rule authorizing an equitable action before a judgment is obtained.[3] The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending foreclosure, inherent in the court of chancery before the adoption of the code, is not abrogated by this section.[4]

By the laws of New York, 1870, ch. 151, a receiver of a corporation can be appointed in a civil action, but a motion for a receiver on affidavit of insolvency on eight days notice, after judgment and execution returned unsatisfied, has been held not to be such an ac-

[1] New York code of civil procedure, § 713. It will be noticed that by the terms of the first sub-division above quoted, the section contemplates an application by a defendant as well as by a plaintiff. A defendant's right to have a receiver appointed is further secured by § 720 of the same code, which provides that "where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff for the cause of action stated in the counter-claim and demanding the same judgment."

[2] Guernsey v. Powers, 9 Hun, 78.

[3] Adee v. Bigler, 81 N. Y. 349.

[4] Hollenbeck v. Donnell, 94 N. Y. 342.

tion.[1] On the other hand, however, the proceeding authorized by the laws of New York, 1880, ch. 440, for the enforcement of liens upon oil wells for services, etc., is "an action" within the meaning of this section, and the court has power, in a proper case under it, to appoint a receiver of the property *pendente lite*.[2]

Section 104. **Decisions Under Section 713 of the New York Code Continued.** — In an action by a judgment creditor to reach mining stock claimed to be owned by the debtor, but standing on the company's books in the name of his wife, the case was adjudged to be within the meaning of the words "an apparent right to or interest in property" as used in this section, entitling him to apply for a receiver.[3] A mortgagee has an "interest in" the rents and profits of mortgaged premises within the meaning of that term as used in the first subdivision of the section.[4] In an action to foreclose a mortgage the court may, under this section, appoint a receiver of the rents and profits of the mortgaged premises when it appears that the premises are an inadequate security and are deteriorating in value and that the mortgagor is insolvent.[5] This section does not apply to cases between partners, there being a section specially relating to such cases.[6] Where a part of the relief asked for by a defendant in his answer was the appointment of a receiver, and the plaintiff made a like demand in his reply, and moved for the appointment on these concurrent demands only, it was held that the plaintiff's application was not brought within the provisions of sub-division 1 of this section.[7]

Section 105. **Assignments — Appointment of Receivers as Against Assignee.**— If an assignee mismanages and wastes the estate, a creditor of the assignor may maintain a bill to enjoin the further execution of the trust by the assignee, and have a receiver appointed to take charge of the estate.[8] "Creditors who have neither lien nor title, and have not reduced their claims to judgment, are not entitled to an injunction and receiver in a suit to set aside an assignment and pretended sale by the debtor of his assets."[9]

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[1] Clinch v. South Side Railroad Co. 4 Thomp. & Cook. (N. Y. Sup. Ct.) 224.

[2] Gallagher v. Kearns, 27 Hun, 375.

[3] State Bank of Syracuse v. Gill, 23 Hun, 410.

[4] Hollenbeck v. Donell, 29 Hun, 94.

[5] Ibid.

[6] New York Code of Civil Proc. § 1947; Alford v. Berkele, 29 Hun, 633.

[7] Dusenbury v. Dusenbury, 2 McCarty Civil Proc. Rep. 91; s. c., 4 Browne Civil Proc. Rep. 126 (Com. Pleas, Gen. Term).

[8] Cohen & Company v. Morris & Company, 70 Ga. 318; Goldsmith v. Fechheimer, 28 S. W. R. (Ky.) 21.

[9] Pelzer v. Hughes, 27 S. C. 408.

Pending an application for a receiver by creditors the defendant made a general assignment, and the application was refused it being said that the assignment would protect the rights of all creditors.[1] Where in a proceeding for an injunction and the appointment of a receiver by general creditors of an insolvent against his assignee and preferred creditors, it appears that a final judgment setting aside the assignment and the preferences is probable, a receiver should be appointed and the writ of injunction granted.[2]

A receiver will not be appointed as against an assignee on mere general allegations of benefit to be derived by the creditors.[3]

"Creditors who have neither lien nor title, and have not recovered judgment, are not entitled to an injunction and receiver in a suit to set aside an assignment or pretended sale by the debtor of his assets."[4]

Wherever it is made to appear in a proper suit in equity that there is danger of loss or misappropriation of the property assigned, or a material part thereof, the court may appoint a special receiver of such property, and cause the same to be administered by the receiver under its direction. An assignee is a *quasi* receiver of the debtor's own selection, and the court may take the trust fund out of his hands and put it in the hands of the receiver or person specially appointed by him for that purpose.[5] The receiver succeeds to all the rights of the assignee.[6]

Section 106. **General Creditors.**— It is well established that "creditors who have neither lien nor title, and have not recovered judgment are not entitled to an injunction and receiver."[7]

"A receiver will not be appointed on the petition of mere general creditors whose rights rest only in contract and are not reduced to judgment, and who have acquired no lien on the property of the debtor."[8]

These quotations correctly and fully state the rule concerning the rights of mere general creditors to the appointment of receivers.

Section 107. **Miscellaneous Cases.**— By way of illustrating the rule governing the appointment of receivers, we submit in this and the following section a number of cases in which the appoint-

[1] Hyde v. Weitzner, 45 Minn. 35.
[2] Peoples' Bank of East Orange v. Fancher, 21 N. Y. S. 545.
[3] Penzel Grocer Co. v. Williams, 53 Ark. 81.
[4] Pelzer v. Hughes, 27 S. C. 408.
[5] Wagner v. Coen, 23 S. E. R. (W. Va. Ct. App.) 735.
[6] Sullivan v. Miller, 106 N. Y. 635.
[7] Pelzer v. Hughes, 27 S. C. 408.
[8] Cahn v. Johnson (Tex. Civ. App.) 33 S. W. R. 1000.

ment of receivers was considered. The propositions asserted are those of the courts.

Where there are many creditors claiming the land of a debtor, some by deed, and some by judgment, the land should be placed in the hands of a receiver, to be rented for the benefit of those who shall be entitled.[1]

Where the agent of a state negotiated a loan upon the bonds of the state, in terms not authorized by the act under which he was appointed, a recceiver was appointed to take possession of the bonds remaining in the hands of the lender, and the proceeds of such as had been transferred by him.[2]

During the litigation of the right to a debt due from a third person, the debtor can not be called upon to pay it to either party; but if it be necessary to enforce the debt before a final hearing, a receiver must be appointed.[3]

A receiver of consigned goods will be appointed on bill and motion of the consignor, showing the fraudulent conduct and insolvency of the consignee, even in case of a consignment to sell on a *del credere* commission.[4] Where a judgment creditor claimed that his debtor had prevented collection by conveyances to the defendant, who held the property by virtue of them, although they were, in fact, ineffectual to transfer it to him, it was held that, as the plaintiff did not know what the property was and was therefore unable to levy execution upon it, a receiver should be appointed to deliver it to plaintiff for sale to satisfy his debt.[5] In an action to recover negotiable paper alleged to be transferred to the defendant by the plaintiff's agent in payment of the agent's debt, if the plaintiff shows an apparent right, and especially if the defendant is insolvent or had suspended payment, the court may appoint a receiver.[6]

Section 108. **Further of Miscellaneous Cases.**— Where one party has a clear right to the possession of property, and the dispute is as to the title only, the court will incline against disturbing the possession.[7] Where the object of the suit is merely to compel

[1] Cole v. McRae, 6 Rand (Va.) 644.

[2] State v. Delafield, 8 Paige, 527.

[3] Mills v. Pittman, 1 Paige, 490.

[4] Micklethwaite v. Rhodes, 4 Sandf. Ch. 434. For cases involving special facts see Fripp v. Chard Ry. Co. 21 Eng. Law & Eq. 53, where a receiver was appointed; and Collins v. Young, 28 Eng. Law & Eq. 14; and Huerstel v. Lorillard, 6 Robert (N. Y. Super. Ct.) 260; s. c. 7 Id. 251, where applications were refused.

[5] Young v. Heermans, 5 Hun, 121.

[6] Brown v. Northup, 15 Abb. Prac. (N. S.) 333.

[7] Ellett v. Newman, 92 N. C. 519; Lenox v. Notrebe, Hemp. 255; Myers v; Estell, 48 Miss. 401; Parkhurst v. Kinsman, 2 Blatchf. 78.

the payment of money there is no sufficient ground to warrant the appointment.[1] There must be danger of its loss unless the court take charge of it.[2]

Rings and jewelry, having been declared not to be wearing apparel, but beyond the reach of process while on the person, have been held to the subject-matter of a receivership, and a receiver has been appointed and an order made for the delivery of the jewelry to him.[3] Where there were two deeds of trust on real estate and sale was made under one of them, but the purchaser refused to comply with the terms of the sale, contending that he had a judgment against the grantor and was entitled to the land, which resulted in a controversy, on bill filed by the trustee and a showing of insolvency and waste by the grantor, who was in possession, a receiver was appointed to take charge of the land, to rent and preserve it until the conflicting claim could be adjusted.[4] If the complainant establishes a *prima facie* right to property, which is not rebutted by the defendant, he is entitled, on proper showing of threatened loss, to the appointment of a receiver;[5] especially if the person in possession is insolvent.[6] But it was held in the case cited that the court would permit the defendant to give a bond to secure the rents and profits and such damages as might be adjudged against him, and that by so doing a receiver would not be appointed.

The power of appointing receivers is inherent in courts possessed of equitable jurisdiction, and whenever there is in existence an estate or fund and no one is authorized or competent to hold it, or the one in charge thereof occupies the position of a trustee and is wasting or misplacing the property, a receiver may be appointed.[7]

There is no authority for the appointment of a receiver in *quo warranto* proceedings,[8] aside from statute. There may be a receivership incident to an ejectment proceeding.[9] A receiver will not be appointed in every trust of which the court takes jurisdiction; but in a suit to compel a trustee to account for trust funds which he should pay to the beneficiary, but which are retained because of an alleged claim against the latter, a receiver was appointed.[10] A court of equity has full and peculiar jurisdiction not only to preserve a

[1] Hager v. Stevens, 6 N. J. Eq. 374.
[2] O'Mahoney v. Belmont, 62 N. Y. 133, affirming s. c. 37 N. Y. Super. Ct. 223.
[3] Frazier v. Barnum, 19 N. J. E. 316.
[4] Dunlap v. Hedges, 35 W. Va. 287.
[5] Durant v. Crowell, 97 N. C. 367.
[6] McNair v. Pope, 96 N. C. 502.
[7] Flagler v. Blunt, 32 N. J. E. 518.
[8] Commonwealth v. Order of Vesta, 156 Pa. 531; Fraternal Guardian's Assigned Estate, *in re* 159 Pa. 603.
[9] Garniss v. Superior Court of San Francisco, 88 Cal. 413.
[10] Hagenbeck v. Hagenbeck Zoological Arena Company, 59 Fed. R. 14.

trust estate but to prevent its diversion from the true owner, and a receiver may be appointed to take charge of and protect the estate.[1] When creditors of an insolvent debtor file a bill in equity to set aside a conveyance of his property on the ground of fraud, and to subject the property to the satisfaction of their debts, they acquire a specific lien on the property by the service of process under their bill, and are entitled to have a receiver of the property appointed on averment and proof that the appointment is necessary to preserve and effectuate the lien.[2]

A receiver may be appointed of personal property in the jurisdiction of the court though the defendant is a non-resident,[3] or has absconded to avoid service.[4] Where a judgment debtor died it was held that the judgment creditor could not have a receiver appointed to take possession of the chattels of the deceased for the purpose of paying the judgment.[5] A purchaser at a foreclosure sale, being unable to secure possession of the land, instituted his suit in ejectment. The mortgagor and tenants in possession being insolvent and disposing of the crops, it was held that the plaintiff was entitled to the appointment of a receiver to protect the rents and profits.[6]

Under Georgia statute authorizing the appointment of a receiver to sequestrate any assets charged with the payment of debts, where there is manifest danger of loss or destruction or material injury to those interested, it was held a receiver would be appointed on petition of employees over property of a show.[7] On a judgment against personal property a receiver will not be appointed in aid of the suit, unless special circumstances are shown which render the attachment inadequate and inefficient.[8] In a proper case a court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic; and if the case is urgent will do so upon an *ex parte* application.[9] A receiver may be appointed in a court over an estate of a deceased.[10] Where goods were seized under a writ of attachment and were then replevied by the debtor, and a subsequent attaching creditor in the same court

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[1] Knight v. Knight, 75 Ga. 386.

[2] Hear v. Murray, 93 Ala. 127.

[3] Hellebush v Blake, 119 Ind. 349; Gibbons v. Mainwaring, 9 Sim. 77; Smith v. Smith, 10 Hare App. 71; Stratton v. Davidson, 1 R. & M. 484.

[4] Pitcher v. Helliar, 2 Dick. 580; Maguire v. Allen, 1 Ball. & B. 75; Dowling v. Hudson, 14 Beav. 423.

[5] Manchester and Liverpool District Banking Co. v. Parkinson, 22 Q. B. D. 173.

[6] American Freehold Land Mortgage Co of London v. Turner, 95 Ala. 272.

[7] Orton v. Madden, 75 Ga. 83.

[8] Pearce v. Jennings, 94 Ala. 524.

[9] Pountain, *in re*, 37 Ch. D. 609.

[10] Robinson v. Taylor, 42 Fed. R. 803.

charged fraud and collusion between the debtor and the first attaching creditor, it was held that a receiver should be appointed.[1] A receiver has been appointed to take possession of a race horse of great value, and to sell it and divide the proceeds among those entitled thereto, where one of the several owners of the horse secured a third party to attach the horse and it was appraised at a low value and was about to be sold.[2]

The application for a receiver of an estate has been refused in the absence of the persons on whom the estate devolved.[3] In South Dakota a receiver was appointed on the application of the Simmons Hardware Company in a proceeding charging the defendant with having obtained, through the fraud of one of the company's salesmen, knowledge of it's secret code of figures and characters indicating the cost and selling price of its goods.[4] In an action on unsecured promissory notes it was held, in a proceeding by another creditor, that the suit was one at law, and did not call for the appointment of a receiver merely because it was charged that the defendant company was insolvent and that other creditors were threatening to sue it, and that it had no other property out of which any judgment the plaintiff might recover could be satisfied; and this though the defendant consented to the appointment.[5]

In a contest over a strip of mining land, on the sides of which the parties respectively owned and were in possession of the land, which they could mine without disturbing the ores in the strip in dispute, it was held that the remedy was the writ of injunction, and not the appointment of a receiver.[6] Under proper showing a court of chancery has authority to appoint a receiver to take possession of property, the title to which is in dispute, and is to be determined therein.[7] That a judgment debtor has, after the issuing of execution, made a voluntary assignment, has been said to be no bar against the appointment of a receiver.[8] When a trustee is guilty of a breach of trust and is insolvent, he may be removed and a receiver appointed.[9] In a statutory proceeding to enforce liens on vessels it is within the power of the court, sitting as a court of chancery, to appoint a receiver to take charge of and preserve the property pending the suit, though the statute does not authorize such

[1] Sackhoff v. Vandegrift, 98 Ala. 192.
[2] Shehan v. Maher, 17 Hun, 129.
[3] Shepard, *In re*, 43 Ch. Div. 131.
[4] Simmons Hardware Co. v. Weibel, 1 S. D. 480.
[5] Smith v. Superior Court, 97 Cal. 348.
[6] Thomas v. Nantahala Marble and Talc. Co. 58 Fed. Rep. 485.
[7] Tregaskis v. Judge of Supreme Court, 47 Mich. 509.
[8] Tomlinson & Webster Manufacturing Co. v. Shatts, 84 Fed. R. 380.
[9] Van Epps v. Van Epps, 9 Paige, 237.

appointment.[1] A voluntary unincorporated association is to be deemed, in law, a partnership, within the rule that equity may decree the dissolution and distribution of the assets, in litigation between the members, and a receiver may be appointed.[2] The appointment or continuance of a receiver over ninety-five miles of railroad which was earning a gross revenue of eight hundred thousand dollars per annum, to enforce the payment of a judgment of sixteen thousand, the lien of which was seriously controverted, was declared to be "so repugnant to all our ideas of judicial proceedings that we cannot argue the question." It was said that the judgment creditor should pursue the usual mode of enforcing the judgment.[3]

Where the title to an abandoned railroad right of way was in dispute, both parties claiming possession, in an action to quiet title the court refused to appoint a receiver until the right to possession was established at law, even when the defendant attempted to take forcible possession.[4] Where the main object of the bill was to have deeds of trust declared void and a distribution made rateably among the creditors, and it was charged that the trustee had unreasonably delayed executing the trust, but there was no charge that plaintiff ever demanded a sale of the property, and it being alleged that the property would not pay the several creditors under the trust, held that the bill was not sufficient to justify taking the property out of the hands of the trustee, and putting it into the hands of a receiver.[5]

In a suit to subject lands to the payment of liens thereon the court may, in a proper case, appoint a receiver to take charge and rent the lands until a sale can be made. Such a case is proper for the appointment of a receiver when it is shown that the debtor is insolvent, or that the lands are likely to prove insufficient to satisfy the disputed or ascertained liens thereon.[6] Where land was devised to two persons, both being appointed executors and charged with the payment of certain debts, and one of the executors claiming a part of the land under a deed subsequent in date to the execution of the will had entered thereon and was proceeding to operate it as mining property, and it appearing there was some danger of waste of the property, and the solvency of the vendee-executor

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[1] Washington Iron Works Co. v. Jensen, 3 Wash, 584.

[2] Lafond v. Deens, 1 Abb. N. C. 318.

[3] Milwaukee & Minnesota Railroad Co. v. Souter, 2 Wall. 510.

[4] St. Louis, Kansas City and Chicago Railroad Co. v. Dewees, 23 Fed. R. 519.

[5] Pyles v. Riverside Furniture Co. 2 S. E. R. 909.

[6] Ogden v. Chaffant, 32 W. Va. 559.

was doubtful, held to be a proper case for the appointment of a receiver.[1]

In an action to enforce liens against lands, where it appears from affidavit that, owing to the defendant's mismanagement the land is deteriorating and the fences being destroyed, and such statements are not directly controverted, a receiver should be appointed to take charge of the property.[2] Where, after the levy of a writ of execution on land, a portion of it having been condemned for railroad purposes, an equitable action was brought to aid the execution by seeking to have set aside a fraudulent conveyance of the land, it was held that a proper case was presented for the appointment of a receiver, to take and hold the condemnation money which had been paid by the railroad company to the clerk of the court.[3] In an action to set aside a conveyance of land by a deed absolute in form, against a subsequent grantee, on the ground that it was a trust deed only, for the benefit of the grantor, a receiver of the rents and profits should not be appointed, all presumptions being in favor of the party in possession.[4] As a tenant for life is required to pay the taxes and make such repairs as will preserve the property from decay, if he neglects to do either a receiver may be appointed to collect sufficient of the rents to discharge the obligations of the tenant.[5]

Under a contract between father and son that in consideration of the son cultivating the father's land until the latter's death, it would be given to the son, the father having outlived the son, it was held, in an action for the specific performance by the son's widow, that the farm would not be placed in the hands of a receiver.[6] When the purpose of a sugar trust agreement had failed, it was adjudged that each certificate-holder had a right to demand that the affairs of the trust should be wound up and for the appointment of a receiver of the property, though it was in possession of men of high integrity and business capacity.[7] A receiver was refused in a partition proceeding where it was not shown that the party in possession had refused to account for the rents, but it appearing that such party had expressed a willingness to render an account at any time and pay over the share of the plaintiff.[8] A receiver should not be ap-

[1] Stith v. Jones, 101 N. C. 360.
[2] Bailey v. Bailey, 10 S. W. R. 660.
[3] Ahlhauser v. Dond, 74 Tex. 400.
[4] McCool v. McNamara, 19 Abb. N. C. 344.
[5] Murch v. Smith Manufacturing Co. 20 At. R. 213.
[6] Walters v. Walters, 23 N. E. R. 1120.
[7] Cameron v. Havemeyer, 25 Abb. N. C. 438.
[8] Bathmann v. Bathmann, 29 N. Y. S. 959

pointed for property in the hands of a trustee for creditors, who offers to file a bond in double the value of the property, to indemnify all persons interested.[1]

It has been declared not to be an abuse of discretion to appoint a receiver of a fund in litigation which is in the hands of the defendant, though he is financially responsible, when he is charged with fraudulent conduct, and is shown to be attempting to dispose of his property in the state.[2] A receiver will not be appointed on the petition of mere general creditors whose rights rest only in contract and have not been reduced to judgment, and are in no way a lien on the defendant's property.[3] The existence of an adequate remedy at law is always a bar to the appointment of a receiver.[4] Where an attorney retained the possession of a note and the mortgage securing it, claiming a fee for professional service rendered the reputed owner thereof, in an action commenced by a third person for possession of the papers, a receiver was appointed to collect the note and hold the proceeds pending the litigation.[5]

In an action by a vendor to recover goods fraudulently purchased a receiver may be appointed.[6] A receiver cannot be appointed merely to prosecute an action in behalf of the moving party.[7]

In an action to recover possession of land, it being alleged and admitted, or not denied, that defendant is wrongfully in possession and is insolvent, the plaintiff is entitled to the appointment of a receiver. And such appointment is also justified on showing by affidavit or verified petition that, apparently, plaintiff has good title, which is not controverted at all, or is not unequivocally and sufficiently denied by defendant's affidavits.[8]

"Generally creditors complaining of a fraudulent conveyance of his property by their debtor, are not entitled to an interlocutory injunction and receiver." There must be an allegation and showing of insolvency or fraudulent purpose.[9] A creditor of a manufacturing firm attached its property. Other creditors began replevin proceedings, charging fraud. In an equitable action by the attaching creditor against the other claimants, seeking to protect the attachment lien, and to secure an adjudication in one suit upon the con-

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[1] Branch v. Ward, 19 S. E. R. (N. C.), 104.

[2] Bird v. Lamphear, 36 N. Y. S. 1069.

Cahn v. Johnson (Tex. Civ. App.), 38 S. W. R. 1000.

[4] Id.

[5] Gray v. Brown, 33 Ill App. 435.

[6] Martin v. Burgwyn, 88 Ga. 78.

[7] Burnes v. City of Atchinson, 48 Kans. 507.

[8] Lovett v. Slocumb, 109 N. C. 110.

[9] Stillwell v. Savannah Grocery Co. 88 Ga. 100.

flicting claims, it was held that the appointment of a receiver was proper.[1]

In the proceeding by the attorney-general to break the anthracite coal combine between the Pennsylvania Railroad Company and the Philadelphia and Reading Railroad Company, an injunction was granted, and it was declared that the court had power to appoint a receiver for the purpose of preventing a violation of the order.[2] The appointment of a receiver is eminently proper where the plaintiff has an interest in the property in controversy, and it is being absorbed and disposed of, or is depreciating in value because of the remissness of the defendant.[3]

That property subject to levy under a judgment of a state court is unsaleable by reason of its unmarketable condition, though valuable; the further fact that the sheriff is so situated with reference to the property that he cannot execute the writ, are not sufficient to warrant the appointment of a receiver by a federal court.[4] In a Massachusetts case this was said: "A court of equity may appoint receivers in cases not enumerated in the statutes; but no precedent has been found here for the appointment of a receiver to collect debts due by a defendant from persons in foreign jurisdiction, in a suit brought by a judgment creditor against his debtor under the general equity jurisdiction."[5]

There must be some tangible property to justify the appointment of a receiver.[6] A water company sought to enjoin the collection of taxes, but the relief was denied. It was held that the property of the company could not be seized for taxes, but that it would be required to pay the taxes into court, and, failing to do so, a receiver would be appointed to manage the property until a sum was collected sufficient to pay the taxes and the costs of the proceeding.[7]

During the pendency of litigation over title to real estate, the plaintiff having been defeated and the cause pending on appeal, the plaintiff asked for the appointment of a receiver. In his petition for a receiver it was alleged that the plaintiff had been defeated because of the admission of oral testimony over a written contract, and claiming that the court had erred in admitting the evidence.

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[1] National Park Bank v. Goddard, 62 Hun, 31.

[2] Stockton, Attorney General, v. Central Railroad of New Jersey, 25 St. R. 942.

[3] Jones v. Quayle, 32 Pac. R. 1134.

[4] Buckeye Engine Co. v. Donan Brewing Co. 47 Fed. R. 6.

[5] Amy v. Manning, 149 Mass. 487.

[6] Mercantile Investment and General Trust Co. v. River Plat Loan and Agency Co. 2 Ch. (1892), 303.

[7] Clark v. Louisville Water Co. 90 Ky. 515; Louisville Water Co. v. Hamilton, 81 Id. 517.

Held that to have appointed a receiver would have been to set at naught the regularly adjudged rights of the appellee, the defendant, and would have taken from him the property which, by the proceeding, had been declared should not be taken from him.[1] A receiver has been refused in a proceeding assailing a conveyance of property on the ground of fraud, the defendant being financially responsible to answer to any judgment against him.[2]

Where the appointment of a receiver is authorized by statute under certain circumstances, it is within the sound discretion of the court to make the appointment.[3] In a proceeding instituted to correct the description in a mortgage, it being contended that land on which there was a mill should have been included, it was declared that apprehension of loss from the removal of the improvements did not justify the appointment of a receiver, and, furthermore, that the removal could be prevented by the writ of injunction.[4]

One of the rules by which courts of equity are governed in Maryland, in the appointment of receivers, is: "That fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and that unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application."[5] And in the same state it was held that it must be a strong case that will justify the appointment of a receiver, the ultimate resort of a court of equity, it being a high power never exercised where there exists any other safe or expedient remedy.[6]

So where the road of a railway company, chartered by both the States of Maryland and Pennsylvania, lay partly in each, and the company mortgaged its entire road, with all tolls and revenues, to the State of Maryland by a second or third incumbrance, and it was shown that the road had applied, and intended to continue to apply, the proceeds of such tolls and revenues, not to such payments as fell due under the mortgage, but to junior claims, it was held that this showed sufficient ground for a court in Maryland to interpose to the full extent of its authority, and, on request, to

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[1] Corbin v. Thompson (Sup. Ct. Ind.) 40 N. E. R. 533.

[2] Turnipseed v. Kentucky Wagon Co. 23 S. E. R. 84.

[3] Woodward v. Woodward (Ky. Ct. App.) 31 S. W. R. 734.

[4] American Freehold Land Mortgage Co. v. Turner (Sup. Ct. Ala.) 17 So. R. 85.

[5] Haight v. Burr, 19 Md. 130; Voshell v. Hynson, 26 Md. 83. But see Speights v. Peters, 9 Gill. 472.

[6] Speights v. Peters, 9 Gill. 472.

appoint a receiver of such tolls and revenues, and to impose an injunction upon the company.[1]

It seems, however, that where personal property or the rents and profits of real estate are in dispute, it is sufficient if a proper case for relief by a receivership be shown, whether fraud or spoliation be charged or not, and in such case a receiver will be appointed by the court for the security and more speedy collection of the property, for the benefit of such persons as shall finally appear entitled.[2] On the other hand a receiver will not be appointed unless it appear that such a measure is required to preserve the property from danger of loss, and a sufficient foundation must be laid in the bill or petition, by stating the fact which will authorize the interference of the court in this form. So where a bill set forth the complainant's title, and alleged that a party had wrongfully taken possession of the property, but did not state that such party was insolvent or unable to account for the same, or that the rents and profits were in danger of being lost, the court refused to appoint a receiver.[3]

In Pennsylvania an appointment of a receiver will not be made unless under urgent and peculiar circumstances, where the right to be protected is clearly and definitely established.[4] In New York under the former practice in chancery, the court would not interfere to appoint a receiver pending the litigation, unless there was some evidence that the property was in danger, or there was clear proof of fraud in obtaining possession thereof.[5]

In New Jersey there must be a well-grounded apprehension of injury about to be done. Where the misconduct alleged in the bill occurred, if at all, several years before, and no act was threatened nor mischief impended, an injunction and receiver were refused.[6]

In Georgia it has been decided in a case where a party had an interest in an estate of an intestate, as judgment creditor, and it appeared that the administratrix, by fraud and collusion, was misapplying the assets of such estate in such a manner as to injure such judgment creditor and to prevent the collection of his debt, that a court of equity had jurisdiction to appoint a receiver to take charge of such assets, but that the complainant must show tha he had good

[1] State v. Northern Central R. R. Co. 18 Md. 193.

[2] Ibid.

[3] Clark v. Ridgley, 1 Mc Dec. 70.

[4] Chicago & Allegheny Oil & Mining Co. v. United States Petroleum Co. 57 Pa. St. 83; s. c., 6 Phila. 521.

[5] Willis v. Corlies, 2 Edw. Chan. (N. Y.) 281. For the code provisions and decisions thereor see §§ 102–4, *supra*.

[6] Kean v. Colt, 5 N. J. Eq. 365.

and substantial reasons to fear some probable future injury to his rights or interest, or the court would not interfere in his behalf and take from such executor or administrator the possession and control of the assets of the estate by placing them in the hands of a receiver.[1]

In New Hampshire a court of equity will appoint a receiver whenever it shall be made to appear that the property, in regard to which the controversy exists, is in danger.[2]

In an action by a landlord to enforce his lien for rent, and other persons claim an interest in the property attached, which consists of live stock, farm produce and materials, the appointment of a receiver is proper.[3]

Where goods were under contract providing that they should not be removed from the town, and that purchasers should pay the proceeds of the sales to the vendor, it was held that, in the absence of an express stipulation that the sale was conditional and title was not to pass until the goods were paid for, the vendor had no such interest in the property as would entitle him to the appointment of a receiver, though the purchaser was insolvent and appropriating to his own use the proceeds derived from the sale of the goods.[4]

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[1] Dougherty v. McDougald, 10 Ga. 121.

[2] Ladd v. Harvey, 21 N. H. 514.

[3] Smith v. Dayton (Ia.), 62 N. W. R. 650.

[4] Steele v. Aspy, 27 N. E. R. 739.

CHAPTER VI.

APPEAL FROM ORDER OR DECREE APPOINTING OR DENYING RECEIVER — EFFECT OF — STATUS OF THE PROCEEDING PENDING APPEAL — WHAT WILL BE REVIEWED ON APPEAL.

Section 109. Generally of Right of Appeal — Final and Interlocutory Orders.
110. Further of the Right of Appeal — Final and Interlocutory Orders.
111. The Rule in New York and Minnesota.
112. The Rule in Indiana, California, Nevada and Ohio.
113. The Rule in Pennsylvania, Illinois, Kansas and Tennessee.
114. The Rule in Michigan, Florida, North Carolina, New Jersey and Iowa.
115. The Federal Supreme Court Rule.
116. Status of the Receivership Pending Appeal.
117. Further and Generally as to Status of the Proceeding Pending Appeal — Effect of Appeal.
118. What Will be Reviewed on Appeal — When Reversed.
119. Effect of Reversal of Order or Decree Appointing Receiver.

Section 109. **Generally of Right of Appeal — Final and Interlocutory Orders.**—Whether an appeal may be taken from an order of court appointing or denying an application for a receiver depends upon the law and practice in the several states concerning appeals. In some jurisdictions an appeal lies only from a final order, judgment or decree, while in others, under statutory provisions, appeals may be taken from interlocutory orders affecting the rights of a party.

Every order appointing or denying an application for a receiver, entered before the final decree, is, technically speaking, interlocutory; and the question of the right to appeal from such order is to be determined by the law and practice of the forum concerning appeals from any such order. This assertion is of equal application to the right to the writ of error.

In some states, however, the statutes providing for appeals, contain the term "final order" in connection with other words, the entire phrase being sufficiently comprehensive to include what are strictly termed interlocutory orders.

Section 110. **Further of the Right of Appeal — Final and Interlocutory Orders.**—It has been adjudged that an order appointing or removing a receiver is a final order in the meaning of a statute

permitting an appeal to be taken from "a final order affecting a substantial right."[1] But the mere term "final order" does not include an interlocutory order appointing a temporary receiver.[2]

When a cause in chancery was ripe for final hearing on pleadings and proofs it was said that an order appointing a receiver of partnership property was appealable, though in terms it did not purport to be a final order. "It was made, therefore," said the court, "when the final decree should have or might have been made."[3]

As the appointment of a receiver results necessarily in changing the possession of the property it has been correctly held that the order of appointment is within the code provision allowing an appeal from any decree or order requiring a change in the possession of property.[4]

But under a code provision providing for an appeal from an order whereby "the possession of property is changed," it was held that an appeal would not lie from an order vacating the appointment of a receiver, whether absolutely or conditionally, and directing a return of the property to the person from whom it was taken, for the reason that the resulting change of possession was not such as was contemplated by the statute. "The refusal to appoint a receiver," the court said, "may not be appealed from, and the removal of a receiver is not appealable."[5]

And when the appointment of a receiver takes from a party a possession to which he is entitled of right, it has been held that an appeal may be taken from the order.[6]

It may be asserted to be the rule that an interlocutory order appointing or refusing to appoint a temporary receiver is not a final

[1] Cincinnati, Sandusky and Cleveland Railroad Co. v. Sloan, 31 Ohio St. 1. See also Collins v. Case, 25 Wis. 651, in which it was held that an appeal would lie from an order directing a receiver to invest certain funds instead of distributing them, the statute allowing an appeal from "a final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment." An application to be allowed to bring an action against a receiver is a special proceeding within the meaning of a statute providing for appeals from a final order affecting the right of a party, and an order denying such application is appealable for the reason that it finally disposes of the right of the parties in such proceedings. Meeker v. Sprague, 5 Wash. 242.

[2] Maysville & Lexington Railroad Co v. Punnett, 15 B. Mon. 47. An order fixing the compensation of a receiver is a final judgment, and from it an appeal will lie. It is a "distinct proceeding in itself." Thompson v. Huron Lumber Co. 5 Wash. St. 527.

[3] Morey v. Grant, 48 Mich. 326.

[4] Shannon v. Hacks, 88 Va. 338.

[5] Hannon v. Weil, 69 Miss. 476. A receiver cannot appeal from an order removing him. Colvin *in re*, 3 Md. Ch. 278.

[6] Brown v. Ring, 77 Mich. 159; Taylor v. Sweet, 40 Id. 739.

order, and an appeal therefrom is not authorized in the absence of a statute so providing.[1]

Section 111. **The Rule in New York and Minnesota.** — In New York, where the code authorizes an appeal from an order made in any action upon notice, "where it affects a substantial right," it has been held that an order to set aside the appointment of a receiver in supplementary proceedings, appointing a new receiver and directing the first one to account to the latter, is discretionary, and not appealable.[2] But in the same state it has been declared that an appeal lies from an order denying a motion for the appointment of a receiver.[3]

In Minnesota an order denying a motion for the appointment of a receiver has been declared to be within the meaning of the statute allowing appeals from orders "granting or refusing a provisional remedy," and an appeal from such an order was allowed.[4] And in that state it has also been held that an order appointing a receiver affects a substantial right of the defendant, and an appeal may be taken from it.[5]

Section 112. **The rule in Indiana, California, Nevada and Ohio.** — In Indiana a statute authorizes an appeal from an order appointing or refusing to appoint a receiver, without waiting for the final determination of the case;[6] and in that state it has recently been decided that, on an appeal from an interlocutory order appointing a receiver, the complaint may be looked to, in connection with the evidence, to determine whether the receiver ought to be appointed, and, where the evidence is conflicting, the appellate court will not weigh it, or overrule the discretion which the court below exercised in making the appointment before the final hearing on the merits.[7]

But in California, by statute, no appeal lies from an order appointing a receiver;[8] and under the code (section 939) a direct appeal from an order made before judgment appointing a receiver is not allowed, nor is such an order subject to be reviewed upon an appeal

[1] See following sections 111–115.
[2] Connelly v. Kretz, 78 N. Y. 620.
[3] Dollard v. Taylor, 33 N. Y. Super. C. 496.
[4] Grant v. Webb, 21 Minn. 89.
[5] Knight v. Nash, 22 Minn. 452.
[6] R. S. Ind. (1881), § 1281; Dale v. Kent, 58 Ind. 584. See also Buchanan v. Berkshire Life Ins. Co. 96 Ind. 510.
[7] Naylor v. Sidener, 106 Ind. 179.
[8] Cal. Code Civil Proc. § 939; French Bank Case, 53 Cal. 495; Emerie v. Alvarado, 64 Cal. 529.

from the final judgment; but if in excess of the jurisdiction of the court, the order may be reviewed under section 1068 of the code.[1]

Under the practice in Nevada an appeal will not lie from an interlocutory order appointing a receiver, the action of the lower courts in this respect being capable of revision only on appeal from the final judgment;[2] and similarly in Ohio, an order appointing a receiver of the revenues of a railroad is not a final order, from which appeal may be taken.[3]

Section 113. **The Rule in Pennsylvania, Illinois, Kansas and Tennessee.** — In Pennsylvania appeal lies only from a final order or decree, and it has been held that an order appointing a receiver for partnership affairs is interlocutory only, and not final within the meaning of the statute, and no appeal will lie from it.[4]

In Illinois a writ of error will not lie from an order appointing a receiver, such order being held to be purely interlocutory, and not final determining the rights of the parties.[5]

In Kansas an order of a judge at chambers appointing a receiver is not a final order involving the merits of the action, but a mere provisional or interlocutory order, from which no appeal will lie.[6]

In Tennessee, where, by statute, the supreme court may grant writs of *supersedeas* to interlocutory orders, as in case of a final decree, an order appointing a receiver, being within the discretion of the court, cannot be superseded by the supreme court;[7] and a bill of review will not lie to revise or correct the action of the court in appointing a receiver, since the order is interlocutory, and may be revised or corrected by the same court, or, if improvidently made, may be corrected upon final hearing.[8]

Section 114. **The Rule in Michigan, Florida, North Carolina, New Jersey and Iowa.** — In Michigan the laws of the state restrict the right of appeal to decrees and final orders, and the right of appeal from an order of appointment depends upon whether it is a substantial decision of the merits involved, and the principal relief

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[1] La Societe Francaise v. District Court, 53 Cal. 495.

[2] Meadow Valley Mining Co. v. Dodds, 6 Nev. 261. See Callanan v. Shaw, 19 Iowa, 183.

[3] Eaton & H. R. R. Co. v. Varnum, 10 Ohio St. 622. See also for a discussion of appeal under the Ohio Code, C. S. & C. R. R. Co. v. Sloan, 31 Ohio St. 1.

[4] Holden's Admr. v. McMackin, Par. Eq. Cas. 270.

[5] Coates v. Cunningham, 80 Ill. 467.

[6] Hottenstein v. Conrad, 5 Kan. 249; Kansas Rolling Mill Co. v. A., T. & S. F. R. R. Co. 31 Kan. 90.

[7] Baird v. Turnpike Co. 1 Lea, 394; Bramley v. Tyree, 1 Lea, 531; Roberson v. Roberson, 3 Lea, 50.

[8] Johnson v. Hanner, 2 Lea, 8.

sought, or whether it is merely ancillary or incidental, and consequently an appeal will lie in some cases in that state and in others not. So when the object and purpose of the action was to remove administrators of an estate, and place the assets in the hands of a receiver, the interlocutory order appointing a receiver was regarded as in effect a final order or decree, since by it the object of the action was accomplished, and an appeal from it was allowed.[1] A similar ruling was made in a case where the executor of a deceased partner applied for an order for a receiver over the firm assets.[2] But where in a partition suit, the bill asked for a receiver, the order appointing him was held to be merely interlocutory, the effect of it being ancillary and incidental to the principal relief sought, and not appealable;[3] so also of an order for a receiver to take possession of securities pending a dispute as to the title to them, where the order was held not appealable,[4] and so, too, of an order refusing a receiver in an action for foreclosure of a mortgage.[5] In the same state it has been further decided that *mandamus* will not lie, whether an appeal will or not, to review an order for the appointment of a receiver for an assigned estate.[6]

In Florida the statute allows appeal from interlocutory orders.[7]

Under the code of North Carolina the appointment of a receiver in supplemental proceedings does not rest solely in the discretion of the judge, and his action on application for a receiver therein may be reviewed by the supreme court.[8]

In New Jersey if it appear that the court below had authority and jurisdiction to make the order, and no manifest error was committed in making it, it will not be reversed on *certiorari;* to warrant a reversal the illegality of the order must be apparent to the appellate court; and on *certiorari* the appellate court will not weigh the evidence. If it be shown that the court below had jurisdiction and power to act it will suffice.[9]

In Iowa it is held that an appeal lies from an order appointing a receiver, whether entered in vacation or term time.[10]

Section 115. **The Federal Supreme Court Rule.**—In the United States supreme court, in a case where stockholders filed a bill to set

[1] Lewis v. Campau, 14 Mich. 458. See Hodges v. McDuff, 169 Mich. 76.

[2] Barry v. Briggs, 22 Mich. 201.

[3] Duncan v. Campau, 15 Mich. 415.

[4] Brown v. Vandermeulen, 41 Mich. 418.

[5] Beecher v. M. & P. R. M. Co., 40 Mich. 307.

[6] Scott v. Wayne Circuit Judge, 58 Mich. 312.

[7] McClellan's Digest of Laws of Florida, p. 167, ch. 17, § 2.

[8] Coates v. Wilkes, 92 N. C. 376.

[9] Journeay v. Brown, 2 Dutch. 111.

[10] Clark v. Raymond, 84 Io. 251.

aside a lease of the property of a corporation for fraud, and for the appointment of a receiver, and, after hearing upon the merits, a decree was rendered as prayed in the bill, it was held that the decree was so far final that an appeal would lie, though an accounting was still necessary to determine finally the rights of the parties.[1]

Section 116. **Status of the Receivership Pending Appeal.**— Where receivers were appointed in an action brought to obtain the direction of the court and its judgment as to the construction of a will and as to the duties of the executors under it, and praying for a sale of the real estate for the payment of legacies and an appeal was taken, it was held that the receivers remained in office pending the appeal.[2] In California, in case an appeal is taken from an order adjudging a defendant to be insolvent, the functions of a receiver appointed in the cause are not suspended; and the court will not stay proceedings in an action brought by the receiver.[3] But in Florida where the laws of the state authorize the appellate court to issue a *supersedeas* pending an appeal, if a *supersedeas* is granted on appeal from an order allowing a receiver, the power of the court below and of its officer, the receiver, is thereby suspended. It does not render unlawful the acts done by the receiver before the appeal, but prohibits his continuing to act, and he must restore the property to the person from whom it was taken.[4] In West Virginia the circuit court may, to preserve rents and profits of real estate, in a proper case, appoint a receiver, notwithstanding the case is pending in the supreme court of appeals on a *supersedeas*.[5]

Section 117. **Further and Generally as to Status of the Proceeding Pending Appeal — Effect of Appeal.**— The effect of an appeal in a receivership proceeding is of great importance and may be generally understood from a consideration of the cases upon the question.

The functions of a receiver appointed after final decree for the purpose of rendering it effective, are said to be suspended by an appeal and giving an undertaking sufficient to stay proceedings under the decree.[6] It was asserted in the first one of the cases cited that a receiver could not be appointed after a bond to stay the enforcement of the decree had been given.

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[1] Winthrop Iron Co. v. Meeker, 109 U. S. 180.

[2] Swing v. Townsend, 24 Ohio St. 1. But see Allen v. Chadburn, 3 Bax. 225.

[3] *In re* Real Estate Associates, 58 Cal. 356.

[4] State v. Johnson, 13 Fla. 33.

[5] Hutton v. Lockridge, 27 W. Va. 428.

[6] Havemeyer v. Superior Court, 84 Cal. 327; Everett v. State of Maryland, 28 Md. 190; State v. Johnson, 13 Fla. 33.

An appeal from an order appointing a receiver stays all proceedings under the order, and the court will not be required by writ of mandamus to enforce the order.[1] This, of course, when the appeal and the performance of the conditions attending it effect a stay of all further proceedings; as is the result of giving an appeal bond.

Where a receiver was appointed and possession of the property taken, and after an appeal was taken and bond given, the property was returned to the defendant, it was held that, on affirmance of the judgment, it was the duty of the receiver to sue on the appeal bond without an order of the court requiring him to do so.[2] It was said that the affirmance by the appellate court of the order appointing the receiver operated as a revocation of the order rendered in the court below directing the receiver to return the property to the defendants.

It has been said that if the receiver is in possession of the property an appeal from the order appointing him and the execution of an appeal bond do not abrogate the appointment; that the property remains *in gremio legis* and is not subject to levy under a writ of attachment; that a levy made under such circumstances is void.[3] But where the receiver had not taken possession of the property it was held that an appeal and *supersedeas* were sufficient reason for vacating the order of appointment, which should have been done; but that the receiver was, nevertheless, entitled to compensation for services performed.[4]

During the pendency of an appeal from an order appointing a receiver the cause remains in the *nisi prius* court, and the pleadings may be amended as under ordinary circumstances.[5]

In the matter of the petition of the Farmers' Loan and Trust Company[6] Mr. Justice Bradley said, that after appeal from a final decree in a foreclosure suit and the pending of the suit in the supreme court, *supersedeas* bond having been given, the control of the fund in dispute belonged to the supreme court, subject to the management of the property by the court below. "In such management," it was asserted, "that court is the agent of this court, and all its acts in that respect are subject to review and supervision here when properly before us."

[1] Virginia, Tennessee & Georgia Steel and Iron Co. v. Wilder, 88 Va. 942.

[2] Everett v. State of Maryland, 28 Md. 190.

[3] Stanton v. Heard, 14 So. R. 359.

[4] Louisville and St. Louis Railroad Co. v. Southworth, 38 Ill. App. 225.

[5] Wabash Railroad Co. v. Dykeman, 133 Ind. 56.

[6] 129 U. S. 206. In this proceeding it was held that an order rendered by the circuit court after final decree of foreclosure, and after appeal therefrom was a final decree from which an appeal could be taken.

In a Florida case[1] a receiver was appointed of a railroad company, being directed to take charge of and operate the railroad on interlocutory order. Appeal was taken and there was a *supersedeas* and stay of proceedings. The receiver refused to obey the order of the supreme court which went with the granting of the *supersedeas*, that he return the railroad property to the company. A contempt proceeding followed. It was contended in behalf of the receiver that he was not guilty of any contempt, because he was answerable only to the court which appointed him, under whose orders he had acted. The order of appointment was interlocutory. It was held that the *supersedeas* had the effect of staying all proceedings under the order appealed from and suspended its operation. The authority of the receiver to continue to act as such was made nugatory by the operation of the law. "The *supersedeas*, as understood by us and seems to be understood by the courts, does of necessity retract by suspending the life of the order appealed from; reaches back to that order and forbids action under it," said the court. "A final decree is supposed to be pronounced with deliberation, upon competent proofs and with due notice to parties. Hence new rules, duties and interests may be created which become fixed and irrevocable. But it is not so of an interlocutory order made at the outset, and perhaps before the parties having large interests at stake are summoned, or even before they suspect the attack of the complaining party." It was asserted by the court that, without any mandate, the effect of staying the proceedings by *supersedeas* required the court and its officers to surcease and desist from taking and holding the railroad, its property and moneys and required them to leave the road as found until the determination of the matter by the appellate court. The receiver was adjudged guilty of contempt and ordered to jail until he had purged himself thereof.

After final decree and pending an appeal therefrom it is within the power of the lower court to appoint a receiver to preserve the property, though the decree be adverse to the plaintiff, and the bill does not pray for the appointment of a receiver.[2] But the application for the receiver must be made to the trial court.[3]

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[1] State v. Johnson, 13 Florida, 33.

[2] Moran v. Johnston, 26 Gratt. 108; Colwell v. Garfield National Bank, 119 N. Y. 408; Adkins v. Edwards, 2 S. E. R. 439; Chicago and South Eastern Railway Co. v. St. Clair (S. C. Ind.), 42 N. E. R. 225; Brinkman v. Ritzinger, 82 Ind. 358; Adkins v. Edwards, 88 Va. 316.

[3] Eastman v. Cain, 68 N. W. R. (Neb.) 123. See section 15.

An appeal without *supersedeas* does not affect the power and duty of the receiver, and he may and should proceed to do what he was appointed to accomplish. Such was the ruling of the supreme court of Florida, where, after an appeal was taken, but without *supersedeas*, the receiver, or, as in the case called, the master, paid attorneys' fees. On reversal of the judgment it was held that the defendant could not recover the amount paid from the attorney, it being declared that restoration could only be had from the plaintiff.[1]

Where the dissolution of a corporation had been decreed and a receiver appointed, who had qualified and taken possession of the property, it was held that the defendant had no cause to complain of an order directing the receiver to make no sale or distribution of the property pending the appeal, or until the further order of the court.[2]

From the authorities and reason there may be logically deduced the following principles, which should govern questions concerning the subject of this section:

1. If from an interlocutory order or a final decree appointing a receiver an appeal be taken, bond given and a *supersedeas* effected, the necessity for a receiver and the power of the court to enforce the order or decree cease. The bond will furnish ample protection, and the *supersedeas* will stay all enforcement of the order or decree. The exception to this rule would be where, because of equality of title, the plaintiff's right to the possession of the property is the same as that of the defendant — as in a proceeding between partners — and the controversy is not over the correctness of the appointment but concerns the adjustment and settlement of accounts between the parties.

2. If a receiver be appointed and takes possession of the property prior to the appeal and *supersedeas*, the consummation of the appeal, with bond and *supersedeas*, gives to the defendant the right to demand and have the property returned to him.

3. A simple appeal without bond does not affect the power of the court to enforce the order or decree appointing a receiver and sequestrating the property.

4. After and pending an appeal of a suit without bond, the trial court has power to appoint a receiver and take possession of the property in controversy.

5. In a proceeding by a state to dissolve a corporation and compel a forfeiture of its charter, where the continuance of the corporation to do business and control its affairs would be dangerous to

[1] Florida Central Railroad Co. v. Bisbee, 18 Fla. 60.

[2] People v. North River Sugar Refining Co. 6 N. Y. S. 408.

the public and produce such loss and injury as could not be readily calculated and recovered in an action on a bond, an appeal and *supersedeas* cannot deprive the court of the power to seize the property of the company and prevent the further transaction of its business pending the appeal. But the winding up of the corporation's business and distribution of its assets should be held in abeyance.

6. If a temporary receiver is appointed and takes possession of the property in pursuance of an interlocutory order from which an appeal is not or can not be taken, and continues in charge and control of the property, an appeal from a final decree, with or without bond, will not affect the receiver's acts prior to the final decree.

Section 118. **What will be Reviewed on Appeal—When Reversed.**—The appointment of a receiver and the selection of a person to perform the duties of the office are, when within the jurisdiction of the court to which the application is made, matters within its sound discretion. An appellate court will not entertain an appeal in receivership proceedings and control and reverse the order or decree of the lower court in appointing or denying an application for a receiver, or selecting a person for the office, except when it is made to appear that the discretionary power of the court has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term "abuse of power."[1]

The decision of the lower court will not be disturbed unless the appellate court, on an examination of the law and facts, affirmatively determines that the appointment was not warranted. And in determining the question the findings upon questions of fact will not be reversed if there is a substantial conflict in the proof in regard to them.[2] Where there are affidavits for and against the application, the appointment will not be disturbed.[3]

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[1] Sanders v. Slaughton, 89 Ga. 34; Crittenden v. Coleman, 70 Ga. 293; Roberts v. Washington National Bank, 37 Pac. R. 26; Beaumont v. Beaumont, 166 Pa. 615; s. c. 31 St. R. 886; Nimocks v. Cape Fear Shingle Co. 110 N. C. 230; Bliley v. Taylor, 86 Ga. 163; Fluker v. Emporia City Railway Co. 48 Kans. 577; Ponder v. Tate, 96 Ind. 330.

In *certiorari* proceedings the only question to be considered is the jurisdiction of the court to appoint a receiver, and not whether the power was properly exercised. State ex rel. Independent District Telegraph Co. v. District Court, 39 Pac. (Mont.), 816.

[2] Roberts v. Washington National Bank, 37 Pac. R. 26.

[3] Pouder v. Tate, 96 Ind. 330. In determining whether the appointment of a receiver was proper, the fact that he has given bond will weigh with the court in favor of the appointment. Werborn's Administrator v. Kahn, 93 Ala. 201.

If from all the facts a court believes

The sufficiency of the bill so far as it concerns the relief asked for in the final decree will not be considered on an appeal from an interlocutory order appointing a receiver for the reason that it is under the control of the trial court and may be amended any time before final judgment.[1]

Where a receiver was appointed by a register without notice, and an appeal and a further hearing before a chancellor additional affidavits were produced and the receiver was continued, on appeal from the latter order it was held that the only question for review was the correctness of the chancellor's ruling in continuing the receiver.[2]

Though a receiver be erroneously appointed, if the defendant is not thereby prejudiced or injured, which is admitted, the decree will not be reversed.[3]

Section 119. **Effect of Reversal of Order or Decree Appointing Receiver — Expenses of Receivership.** —The only matter of any question resulting from a reversal of an order or decree appointing a receiver who has taken possession of the property is that relating to the payment of the expenses attending the receivership. All such expenses must be paid regardless of who is the winning party, and should be paid by the plaintiff when the appointment is wrongly made.[4]

The subject received extended consideration by the supreme court of New York in the case of Weston v. Watts,[5] in which a receiver was appointed who took possession of the property. On appeal the decree was reversed and the receiver ordered to return the property and render an account of his administration before a referee, who was authorized to fix the compensation of the receiver, which the plaintiff was ordered to pay. The receiver held the property and demanded payment of his compensation. As to this action the court declared that it could not be sustained, and that

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the ends of justice require it to put its hands upon the fund in question and keep it in *statuo quo* until a jury can pass upon the case, only a very strong case will authorize it to interfere with the action of the court in appointing a receiver. Wolfe v. Claflin & Co. 81 Ga. 64.

[1] Supreme Sitting Order of Iron Hall v. Baker, 134 Ind. 293. Neither the sufficiency of the complaint nor of any other pleading, except that which led immediately to the appointment of the receiver, will be considered on appeal, all other questions being for the trial court to control and determine. Wabash Railroad Co. v. Dykeman, 133 Ind. 56.

[2] Werborn's Administrator v. Kahn, 93 Ala. 201.

[3] Clark v. Johnston, 15 W. Va. 804.

[4] Moyers v. Coiner, 22 Fla. 422.

[5] 45 Hun, 219.

the plaintiff, the unsuccessful party in the litigation, must pay the expenses of the receivership. "To take a person's property from him by an unauthorized proceeding," said the court, "and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the courts had the power to do so."

In a concurring opinion Barnett, J., said: "It would be a pretty severe rule, even if constitutional, which would compel a litigant to pay the expense of having his own property illegally taken out of his custody for a while. There might be cases where a receiver was erroneously appointed, but not under such circumstances as to make the appointment absolutely void, which would warrant an order that his disbursements be paid out of the fund, as, for example, where the property consisted of a herd of cattle for which the receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it if the animals had remained in his own custody." But commissions and disbursements, except such as would have been necessary if the custody of the property had remained unchanged, it was said, were on a different footing.

We conceive no reason to question the correctness of this opinion of the New York court, but appreciate that it is both logical and just. There is one feature of the question which the opinion does not cover, the payment of the expenses of the receivership when the plaintiff is insolvent. There cannot, of course, be any recourse on the court, and if the expenses are not paid out of the fund or property held by the receiver they must go unpaid. To guard against such an emergency the court could, and should, in proper cases, impose on the plaintiff the giving of a bond as a condition to the appointment of a receiver, so that in the event the plaintiff ultimately fails to maintain the action the payment of the expenses attending the receivership may be properly adjusted. As a rule receivers are appointed without requiring any bond from the party procuring their appointment, the receivers being ordered to give bond for the faithful performance of their duties.[1]

On appeal in a Texas case the appointment of the receiver was revoked and the receivership vacated. Pending the appeal the receiver gave bond and proceeded with the management of the property in compliance with the order of the court. As to the contention that, as the appointment was wrong the defendant should not

[1] Briarfield Iron Works Co. v. Foster, 54 Ala. 622, 633; Mority v. Miller, 87 Id. 331; Dollins v. Lindsey, 89 Id. 217.

be charged with the payment of the receiver's compensation, but that it should be taxed against the plaintiff, the court said: "The authorities upon this question are badly in conflict, but we believe the better reason to be with those which hold that, inasmuch as the receiver is appointed to manage and preserve the property pending the litigation for the benefit of those ultimately adjudged to be entitled to it, the costs of doing this, including his commissions, should ordinarily be made a charge upon the property itself, and paid out of its proceeds regardless of who finally succeeds. * * * To hold otherwise might greatly embarrass the courts in obtaining suitable persons to fill these important positions, for we apprehend that few indeed could be found who would be willing to give the enormous bonds and incur the heavy responsibilities assumed by receivers of large properties, if they were required to await the result of the litigation for their compensation, and in case the defendant should be successful could then only look to the plaintiff for its payment."[1]

If the order or decree appointing a receiver is reversed on appeal, he must, it has been adjudged, deliver back all the property received without deducting commissions.[2] In one of the cases cited this was said: "We do not decide that in all cases where an order appointing a receiver * * * is reversed no commission can be allowed the receiver. There may be circumstances existing in any such case which would render it a matter of discretion whether or not to permit commissions, etc., to the receiver; and with its exercise we would have no right of review if not abused."[3]

The erroneous appointment of a receiver does not constitute him a usurper.[4]

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[1] Espuella Land and Cattle Co. v. Bindle (Tex. Civ. App.) 32 S. W. R. 582.

[2] Weston v. Watts, 45 Hun, 219; Pittsfield National Bank v. Bayne, 140 N. Y. 321.

[3] Pittsfield National Bank v. Bayne, 140 N. Y. 321. In this case a partnership made a general assignment. The plaintiff, a creditor of the partnership, after obtaining a judgment for its claim, commenced action to set aside the assignment as fraudulent. Such was done, and a receiver was appointed and the assignee ordered to pay the amount of plaintiff's judgment to the receiver, and the assignee was ordered to account to the receiver for all the property received from the firm by him as its assignee. Held that as long as such order stood unreversed, it was a protection to the receiver but not so afterwards. The general term held that the receiver had no right to the money, and when the judgment of the special term was reversed the receiver ceased to have any right to retain the money for the purpose of taking his commissions and fees of counsel out of it. "This money belonged to the assignee so far as the receiver is concerned." Held that the receiver must pay back the money undiminished by any claim for commissions or counsel fees paid to his counsel. "It is the same in regard to this property as if the receiver ought not to have been appointed."

[4] How v. Jones, 60 Io. 70.

See further upon this subject the chapter upon compensation of receivers.

CHAPTER VII.

PROCEEDINGS TO OBTAIN THE APPOINTMENT — TIME OF APPOINTMENT—PLEADINGS—NOTICE—THE ORDER.

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I.

As to the Time When Application may be Made.

Section 120. **Before Bill is Filed.**—It being a general rule in courts of equity that relief will not be granted merely upon petition, when no cause is actually pending and no bill filed to give the court jurisdiction, unless in cases of lunatics, etc., and other cases of special emergency,[1] and as a suit in chancery is not begun until the filing of the bill, an appointment of a receiver upon an *ex parte* application before the bill is filed is error, and will be revoked upon appeal, without considering the merits of the application.[2]

After the suit is begun the application for a receiver may be made and a receiver may be appointed at any stage of the proceedings, whenever the facts authorize and require the appointment,[3] and even on the final hearing and as a part of the final decree.[4] In one case, at least, the appointment was made after the master had made his report in pursuance of a decree, it appearing to the court that the conduct of the defendants, who were trustees under a will, had been such as to render a receiver necessary.[5]

Section 121. **Before Summons is Served.**—A receiver may be appointed over the assets of an insolvent corporation before the court has acquired jurisdiction over it by a service as required by statute, other defendants being duly served. In such a case the appointment is in the nature of an equitable attachment, whereby

[1] *Ex parte* Mountfort, 15 Ves. 445; Leddel's Executor v. Starr, 19 N. J. Eq. 159. See section 51.

[2] Crowder v. Moone, 52 Ala. 220.

[3] Henshaw v. Wells, 9 Humph. (Tenn.) 568.

[4] Schulte v. Hoffman, 18 Texas, 678; Shee v. Harris, 1 Jo. & Lat. (Ir.) 91.

[5] Bowman v. Bell, 14 Sim. 392.

the court acquires the custody of the property and retains it until the final determination of the case.[1]

In Nevada, in an equitable action by the assignee of one member of a copartnership against the assignee of the only other member, the district court has jurisdiction to appoint a receiver after summons has been issued, but before it has been served, the defendant being insolvent and refusing to give the plaintiff possession of the partnership property.[2]

Section 122. **The Remedy is Not to be Postponed Until the Final Hearing.**—In general a receivership is ancillary, or incidental, to the main purpose of the bill; but a temporary receiver may be appointed to protect the property of a corporation where a case is presented which demands the relief which can be best given by a receivership, although the time has not arrived when other substantial relief can be asked.[3] But it has been recently held by a federal court that a receiver will not be appointed until the court shall have determined that the right of foreclosure exists, though there has been default in payment of interest coupons secured by a railroad mortgage, if it appear that there is a fair and reasonable claim by the company, growing out of contemporaneous contracts, that the time of payment has been extended, or that the plaintiffs are precluded from relying on the default.[4]

In Georgia, where application for a homestead and exemption out of a husband's property is made by the wife with his consent, the creditors may, by petition, have a receiver appointed at the time of the application. Their rights are not to be delayed until the homestead and exemption are finally set apart.[5]

Section 123. **Before Answer is Filed.**—The English court of chancery for a long time, and until comparatively recent years, would not entertain the application until after the defendant had filed his answer; but, the rule being broken in cases requiring the prompt action of the court in emergencies, it is now well settled in the practice of that court that, while it will adhere as closely as possible to the old rule for the protection of the rights of defendants and the cautious administration of justice, it will, in cases of emergency, where prompt action is necessary to protect the plaintiff's

[1] St. Louis & Sandoval, etc., Co. v. Sandoval, etc., Co. 111 Ill. 32.

[2] Maynard v. Railey, 2 Nev. 313.

[3] Brassey v. New York & N. E. R. R. Co. 22 Blatchf. 72, 79.

[4] American Loan & Trust Co. v. Toledo, C. & S. Ry. Co. 29 Fed. Rep. 416, 420 (Dec., 1886).

[5] Landrum v. Chamberlin, 78 Ga. 727.

right, and where good cause is shown and clearly established by affidavits grant applications for a receiver before the answer is filed.[1]

It requires strong and special grounds to justify the appointment of a receiver before answer, and the application must clearly show the necessity therefor.[2]

And so it has been held that, when it is shown that an executor is mismanaging, wasting and endangering the property entrusted to him by will, a sufficient cause is presented for the appointment of a receiver before answer filed;[3] and so, also, where the plaintiff shows a good equitable title to the property for which a receiver is asked as against a title of the defendant which is manifestly bad.[4]

It has been said that when the appointment of a receiver is the principle question in the case and is required as a means for enforcing the decree, and not merely for an ancillary purpose connected with the temporary incidents of the suit, a receiver will not be appointed until after answer is filed and at the final hearing.[5]

A receiver may be appointed after answer and hearing before the filing of the replication.[6]

Section 124. **The Practice in this Respect in America.**—The practice of the English court as above stated has been closely followed in this country, and it is now well established that the application may be made and the receiver appointed before the defendant's answer is filed whenever the court is satisfied of the plaintiff's equitable claim to, or interest in, the property in controversy, and that immediate action is necessary to preserve it from the danger of loss or injury, or where fraud is clearly shown, and that danger is imminent unless a receiver be appointed to preserve the property.[7] The practice has been otherwise stated to be that, "if the emergency shown is such as to render it essential to justice that a receiver should be immediately appointed, it may be done

[1] Duckworth v. Trafford, 18 Ves. 283; Metcalfe v. Pulvertoft, 1 Ves. & Bea. 180; Woodyatt v. Gresley, 8 Sim. 180; Vann v. Barnett, 2 Bro. C. C. 158.

[2] Baker v. Administrator of Backus, 32 Ill. 79; Tomlinson v. Ward, 2 Conn. 396.

[3] Middleton v. Dodswell. 13 Ves. 266.

[4] Metcalfe v. Pulvertofft, 1 Ves. & Bea. 180.

[5] Union Mutual Life Insurance Co v. Union Mills Plaster Co. 37 Fed. R. 286.

[6] Dutton v. Thomas, 97 Mich. 93.

[7] Johns v. Johns, 23 Ga. 31; Clark v. Ridgely, 1 Md. Ch. 70; Bloodgood v. Clark, 4 Paige, 574; Bank of Monroe v. Schermerhorn, Clarke's Ch. (N. Y.) 214; Jones v. Dougherty, 10 Ga. 273; Williams v. Jenkins, 11 Ga. 595; Duckworth v. Trafford, 18 Ves. 283; Whitehead v. Wooten, 43 Miss. 523; Davis v. Browne, 2 Del. Ch. 188; Probasco v. Probasco, 30 N. J. Eq. 106; Mico v. Moses, 72 Ala. 439.

before answer, since to delay the relief might entirely defeat the object sought by the application."[1]

The rule that the court will not appoint a receiver until the defendant is first heard, unless the necessity be of the most stringent character, is one which can only be enforced upon appeal from the order appointing the receiver.[2]

Section 125. **The Emergency Necessitating Relief Before Answer Must be Shown.**— The element of emergency as a foundation for the action of the court before answer is most frequently found in cases where judgment creditors seek aid in enforcing their judgments, and in such cases the appointment of receivers for the care of the debtor's property before answer filed is common, and, in fact, is the usual practice.[3]

It will readily be seen that the practice of the court in appointing receivers before answer filed, being founded largely upon the necessity of immediate action to secure the property in litigation from injury, loss or waste, requires that such necessity shall be plainly shown before the court will feel itself justified in abrogating the former and ancient rule. So it is held that a receiver will not be appointed before answer, unless it clearly appear that the property is in danger,[4] and that, while, in strictness, a receiver should not be appointed before the coming in of the answer, yet, since the rule has been broken through, the grounds which will induce the court to disregard it must be very strong and special.[5]

Section 126. **Allegations Held to be Insufficient — Affidavits in Defense.** — In the enforcement of this rule of practice it has been decided that when insolvency is relied upon, an affidavit which merely states that defendant is not deemed a responsible man by those who know him, and the defendant replies by an affidavit which fully negatives the insolvency, a receiver will be refused before answer;[6] and so where no danger to the property or interests concerned were alleged.[7]

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[1] Johns v. Johns, 23 Ga. 31. To the same effect see Weis v. Goetter, 72 Ala. 259; Blondheim v. Moore, 11 Md. 365.

[2] Voshell v. Hynson, 26 Md. 33.

[3] Bloodgood v. Clark, 4 Paige, 574; Bank of Monroe v. Schermerhorn, Clarke's Ch. (N. Y.) 214. See the chapter on Receivers in Supplementary Proceedings, *infra*.

[4] West v. Swan, 3 Edw. Chan. (N. Y.) 420.

[5] Clark v. Ridgely, 1 Md. Ch. 70; Weis v. Goetter, 72 Ala. 259; Latham v. Chaffee, 7 Fed. Rep. 525; Beecher v. Bininger, 7 Blatchf. 170; The Brick Co. of Baltimore City v. Robinson, 55 Md. 410; Whitehead v. Wooten, 43 Miss. 523; West v. Swan, 3 Edw. Chan. (N. Y.) 420; Baker v. Admr. of Backus, 32 Ill. 115; Micou v. Moses, 72 Ala. 439.

[6] West v. Swan, 3 Edw. Ch. (N.Y.) 420.

[7] Simmons v. Wood, 45 How. Pr. 269.

In an action by a shareholder to cancel illegal stock and to restrain the holders of it from assigning or encumbering it, where it was not shown that the defendants were irresponsible, or that there was any danger of loss from its transfer, the appointment of a receiver on an *ex parte* application before answer was held to be improper.[1]

When an application for a receiver is made before the defendant's answer is filed, on the ground of emergency, the defendant may be heard by affidavit in opposition to the motion.[2] If, however, the defendant does not avail himself of this right for any reason, he may, after filing his answer, enter a motion for the discharge of the receiver, and if, upon such motion, the bill and answer, taken together, show that a receiver ought not to have been appointed, he will be discharged.[3]

Section 127. **While the Case Stands on Demurrer or Plea.**— The appointment of receiver may be made when a demurrer to the bill is pending and undetermined.[4] In a case where an order for a receiver was granted on a special motion of which notice had been given to the defendant's solicitor, who did not appear to oppose it, and the case stood upon demurrer, it was held that the demurrer was no objection to granting the order, and that if the defendant had appeared and defended on that ground, the court would have looked into the pleadings to see whether the demurrer was well taken, and if it had any doubt on the question, would have ordered the motion to stand over until the demurrer was disposed of.[5] But in a case where a receiver was appointed, on an *ex parte* application, to wind up an insolvent corporation, pending the decision of a demurrer putting in issue the right to file the bill, the order was reversed on appeal.[6] A motion for a receiver will be entertained while a plea to an amended bill is pending and not disposed of.[7]

Section 128. **While Appeal is Pending.** — There seems to be no doubt that courts of equity jurisdiction, in cases where this extraordinary remedy of a receivership is necessary to the preservation

[1] People v. Albany & Susquehanna R. R. Co. 7 Abb. Pr. (N. S.) 290.

[2] Kean v. Colt, 5 N. J. Eq. 365; Micou v. Moses, 72 Ala. 439.

[3] Phœnix Mutual Life Insurance Co. v. Grant, 8 MacArthur, 220.

[4] Turnbull v. Prentiss Lumber Co. 55 Mich. 387.

[5] Howard v. Palmer, Walker's Ch. (Mich.) 391.

[6] Cook v. Detroit & M. R. R. Co. 45 Mich. 453.

[7] Thompson v. Selby, 12 Sim. 100.

of the property in litigation, will not hesitate to exercise their power even after an appeal has been taken on the merits.[1]

Where, in a foreclosure suit, it had been decided by the court of chancery of New Jersey, that certain machinery, which had been levied upon by a judgment creditor was not covered by the mortgage, and the creditor sold it under his execution and bought it himself, and afterwards the complainant appealed from this decision, it was held, upon a motion in the same court, that the complainant was entitled to an injunction against his disposing of the machinery and to have a receiver appointed upon giving proper security.[2] In West Virginia, in a proper case, the circuit court may appoint a receiver of rents and profits, notwithstanding the case is pending in the supreme court on appeal and *supersedeas*, reasonable notice being given to the owner, or tenant, of the lands.[3]

Section 129. **After final decree.** — The importance and practical value of the remedy by a receivership is noticeably illustrated by the fact that it is resorted to in cases of great emergency, or where it is deemed indispensible to the security of the property in controversy, after a final decree upon the merits has been pronounced.[4] But while this practice is well established, it is unusual and the application for a receiver after final decree should be supported by a strong showing of facts. So where, upon such an application in a foreclosure suit, a receiver was appointed upon evidence which showed that the mortgaged property was not going to waste or in need of repairs, but was in a comparatively good state of preservation, the appellate court vacated the order of appointment.[5]

The refusal of a defendant to surrender possession of real estate, the title to which, in an action to determine the rights of the parties in it, had been decided to be in the plaintiff by a final decree, which, however, did not direct him to surrender the possession, has been held sufficient to justify the court in appointing a receiver to collect and preserve the rents, and to insure their application to the payment of the expenses of the estate, but not for the purpose of executing the decree or delivering the possession.[6] And after

[1] Merrill v. Elam, 2 Cooper's Ch. (Tenn.) 513. Text cited and approved in Eastman v. Cain, 63 N. W. R. (Neb.) 123.

[2] Penn Mutual Life Insurance Co. v. Semple, 38 N. J. Eq. 314.

[3] Beard v. Arbuckle, 19 W. Va. 145; Hutton v. Lockridge, 27 Id. 428 (1886).

[4] Beard v. Arbuckle, 19 W. Va. 145; Brinkman v. Ritzinger, 82 Ind. 358; Schreiber v. Carey, 48 Wis. 208; Haas v. Chicago Building Society, 89 Ill. 498; Connelly v. Dickson, 76 Ind. 440.

[5] Adair v. Wright, 16 Iowa. 385.

[6] Wright v. Vernon, 3 Drew. 112.

a final decree confirming a judicial sale of land to a purchaser and awarding a writ of assistance, a receiver was appointed for the rents, etc., it appearing that the defendant was insolvent, and that, if he was permitted to retain the possession, the rents would be lost.[1] So also, after a final decree in foreclosure, a receiver of the rents of the mortgaged premises was allowed against the tenant who by the lapse of time would shortly become entitled by adverse possession if allowed to remain in possession.[2]

Section 130. **Effect of Delay in Making Application — Fraud.**— An application for the appointment of a receiver which has been allowed to sleep for six years, will be denied although some testimony has been taken in the meantime.[3] And where a complainant seeks to take the control of property from those having the legal right of possession, delay on his part in advancing his cause or in making his application, is an objection to the appointment of a receiver.[4]

When the appointment of a receiver is procured by fraud or collusion, the court will revoke it, without inquiring whether the person selected was suitable or not.[5]

II.

THE PLEADINGS — BILL, MOTION, APPLICATION AND ANSWER.

Section 131. **Parties to the Bill.**— It has long been the rule that except in the cases of infants and lunatics, a receiver will not be appointed unless a suit or action is pending,[6] and the party whose property is to be put in a receiver's hands must be made a party to the action so that he may have an opportunity of resisting the application.[7] While a receiver may be appointed by the court, upon its own motion, in a case requiring it, a proceeding for such an appointment cannot be inaugurated or conducted by a stranger having no connection with, or interest in, the subject-matter of the

[1] Merrill v. Elam, 2 Cooper's Ch. (Tenn.) 518.

[2] Thomas v. Davies, 11 Beav. 29.

[3] Hood v. First National Bank, etc., 29 Fed. Rep. 55, (1886).

[4] Tibbals v. Sargeant, 14 N. J. Eq. 449.

[5] Lottimer v. Lord, 4 E. D. Smith, 183.

[6] Pressley v. Harrison, 102 Ind. 14; Baker v. Admr. of Backus, 32 Ill. 79; Merchants' & Manufacturers' National Bank v. Kent, Circuit Judge, 48 Mich. 292, 296; Jones v. Schall, 45 Mich. 379; Hardy v. McClellan, 53 Miss. 507. And see *In re* Hancock, 27 Hun, 575. See section 51.

[7] Dale v. Kent, 58 Ind. 584; Gravenstine's Appeal, 49 Pa. St. 310. See also generally the cases cited in the preceding note.

litigation.[1] But, in a foreclosure suit, on account of the great emergency arising out of the fact that the tenant, who had been in the possession of the mortgaged premises nearly twenty years, and if allowed to continue, would soon become entitled as against all parties by adverse possession, a receiver was appointed, although the tenant was not a party to the suit.[2]

Section 132. **Parties to the Bill Continued.**—Where a bill was filed by one of several parties interested in a common business enterprise against the others who claimed to have become organized as a corporation, the complainant alleging that the company was not a corporation but a co-partnership, and asking the court so to declare and to dissolve the partnership, and to appoint a receiver to take charge of the effects of the company and settle up its affairs, it was held error to appoint such receiver without making the corporation, *qua* corporation, a party to the suit.[3] Although the appointment of a receiver involves the decision of no right,[4] yet it can be made only on the application of one having an acknowledged or strong presumptive title in himself, or in common with others, in the fund, and where there is danger of loss or injury to the property, or the rents and profits.[5]

There can not be the appointment of a receiver of property, the owner of which is not a party to the suit.[6] A party duly served with notice cannot object to the appointment because other persons are not made parties.[7]

Section 133. **Rulings as to Parties in Special Cases.**—Where a suit is brought by one or more members of an unincorporated association, asking for a receiver of its property, it should be against the other members of the association and not merely against its executive officers, since it is, to all intents and purposes, a mere partnership.[8] Where an infant, who was devisee of an annuity from her grandfather during the life of his widow, and afterwards of one-fourth of his estate, his will having been disputed during its probate,

[1] O'Mahoney v. Belmont, 62 N. Y. 133.

[2] Thomas v. Davies, 11 Beav. 29.

[3] Baker v. Admr. of Backus, 32 Ill. 79.

[4] Hottenstein v. Conrad, 9 Kan. 435; Cooke v. Gwyn, 3 Atk. 689. See also Mays v. Rose, Freem. (Miss.) 703; Chicago & Allegheny Oil and Mining Co. v. United States Petroleum Co., 57 Pa. St. 83; s. c., 6 Phila. 521; Fellows v. Heermans, 13 Abb. Pr. (N. S.) 1; McCarthy v. Peake, 18 How. Pr. 138; s. c., 9 Abb. Pr. 164.

[5] Chase's Case, 1 Bland's Chan. 206.

[6] Baker v. Admr. of Backus, 32 Ill. 79.

[7] Rapp v. Roehling, 123 Ind. 255.

[8] Montgomery v. Knox, 20 Fla. 372.

brought a bill for the appointment of a receiver, to receive and pay to her guardian a proportion of the income of the estate, it was held that a bill was her proper remedy, as a receiver would not be appointed on petition, but that the executors and trustees named in the will should be parties to the bill, and an order was made allowing an amendment for the purpose of bringing them in.[1]

A stockholder, after having joined in an application made to the court by the receiver for authority to sell the assets of the corporation, cannot be permitted to question the validity of the receiver's appointment, or of the order directing the sale.[2] Under the New York law of 1869, chapter 902, in proceedings by the attorney-general for the appointment of a receiver of a life insurance company, the court may permit persons interested in the administration of the assets of the corporation to appear in their own interest and be made parties to all proceedings by or against the receiver affecting their rights, and such persons may appeal from all orders made by which their rights are affected.[3]

Where property is decreed to be sold through a receiver to satisfy the creditors of an insolvent, the actual presence in court of all persons whose rights may be affected by the decree is not necessary. The receiver is the representative of the creditors, and through him they are constructively before the court.[4]

Section 134. **The Party in Possession Should be a Party to the Suit.**—In a case in which the person in possession of the property in controversy was made a party defendant in the suit, and filed a plea in abatement, by the allowance of which he was no longer a party, the application for a receiver was refused by Mr. Justice Bradley, of the United States supreme court, on the ground that a receiver could not be appointed over property in possession of a person not a party to the suit.[5]

Section 135. **The Motion for a Receiver May be Renewed after Denial.**—After a motion for the appointment of a receiver has been denied, and even after a denial upon a rehearing, a receiver may be appointed upon a renewed application of the plaintiff upon a new statement of facts, or additional facts showing a sufficient case for the relief asked.[6] If, however, the application has once been re-

[1] Rice v. Tonnele, 4 Sandf. Ch. 568.
[2] Battershall v. Davis, 31 Barb. 328.
[3] Attorney-General v. North American Life Ins. Co., 77 N. Y. 297.
[4] Hammond v. Tarver (Tex. Civ. App.), 31 S. W. R. 841.
[5] Searles v. Jacksonville, P. & M. R. R. Co., 2 Woods, 621, 626.
[6] Attorney General v. Mayor of Galway, 1 Mol. 95.

fused, a new application must be founded upon additional proof showing a proper case for relief, and not merely upon the papers or proofs submitted on the first application. This ruling was made in a case in which the court had intimated, on the first application, that a receiver might be subsequently appointed if the circumstances should warrant it.[1]

It frequently happens that when the court denies a motion for a receiver, it will do so with leave to renew the motion if it appear that additional new proof, sufficient to present a strong case, may be obtained by the moving party.[2] In Georgia it has been held that when a writ of error is pending to an order made at chambers continuing an application made for a receiver until the hearing, the application will be granted in term time and before the final hearing, on the same bill and on the same facts.[3]

If the order be set aside and the receiver be ordered to return the property to defendant, a new application for receiver may be properly made before the property is delivered back.[4]

Section 136. **Applications in Different Actions.**— If two persons having conflicting interests proceed in separate actions at the same time to procure the appointment of a receiver, it is of no importance in which action the appointment is ordered, since the object is to secure the property from waste, injury, etc., for the benefit of all parties interested, and if an appointment, made in one case, is appealed from, thus rendering it incomplete, the court may proceed to make an appointment in the other case, and the last appointment will not be vacated, but extended to the first case.[5] In a contest between two receivers appointed on the same day, and claiming, in hostility to each other, the administration of the estate of an insolvent, the court will inquire into the fractions of the day to determine the actual priority of appointment.[6] Neither the mere preparation and verification of the papers for an application for a receiver, nor the mere fact of first obtaining actual possession of the assets, can settle the question of legal right in respect of priority.[7] In New York it has been held in a case where a receiver had been appointed of a fund which had been subscribed for a particular purpose, on the application of a subscriber who had with-

[1] Fenton v. Lumberman's Bank, Clarke's Ch. (N. Y.) 360.
[2] Devlin v. Hope, 16 Abb. Pr. 314.
[3] McCaskill v. Warren, 58 Ga. 286.
[4] Robinson v. Dickey, 42 N. E. R. 688.
[5] Lottimer v. Lord, 4 E. D. Smith, 183.
[6] People v. Central City Bank, 53 Barb. 412; s. c. 35 How. Pr. 428.
[7] People v. Central City Bank, 53 Barb. 412; s. c. 35 How. Pr. 428. See further as to this subject chapter 8.

drawn from the enterprise, that it was no sufficient objection that a receiver of the fund had been appointed in a former action of the same nature, but the powers and rights of the second receiver will be subordinated to those of the first, and, if the first become *functus officio*, the second is entitled to the custody of the fund, or what remains of it;[1] but in a later case this ruling was modified by the decision that the second receiver takes only that part of the fund which has not been disposed of in the former litigation.[2]

"A receiver does not represent the plaintiffs in a suit, and the court should not in a subsequent suit displace a receiver appointed in a prior suit, affecting the same subject matter. This we state as a general rule of convenience, and do not mean to say that under some circumstances it might not be proper. The proper course, as a general rule of practice, is to extend the receivership in the first suit over the second, subject to the legal and equitable claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receivership was granted. If, however, a different receiver is appointed in the second suit, then the plaintiffs may claim that the receiver in the former shall deliver to the receiver appointed in his suit." This was said concerning proceedings in the same court.[3]

Section 137. **The Application Must Clearly Show the Ground Relied Upon.**— It is well established that in order to secure the extraordinary remedy of the appointment of a receiver, the application must show clearly to the court such facts as will satisfy it that the property can be managed and preserved more advantageously to the parties interested in it, by the court through its agent, a receiver, than by such parties or any of them.[4] It is not sufficient to allege generally that the plaintiff is entitled on principles of

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[1] Bailey v. O'Mahoney, 33 N. Y. Super. Ct. 229.

[2] O'Mahoney v. Belmont, 62 N. Y. 133.

[3] State v. Jacksonville, Pensacola R. Co. 15 Fla. 201.

[4] Ladd v. Harvey, 21 N. H. 514; Chicago and Allegheny Oil and Mining Co. v. United States Petroleum Co. 57 Penn. St. 83; s. c. 6 Phila. 521; Speights v. Peters, 9 Gill. 472; Willis v. Corlies, 2 Edw. Chan. (N. Y.) 281; Tomlinson v. Ward, 2 Conn. 396; Rogers v. Marshall, 6 Abb, Pr. (N. S.) 457; Baker v. Adm'r of Backus, 32 Ill. 79; Clark v. Ridgely, 1 Md. Ch. 70; Kean v. Colt, 5 N. J. Eq. 365; Voshell v. Hynson, 26 Md. 83; Haight v. Burr, 19 Md. 130; State v. Northern Central Ry. Co. 18 Md. 193; Harrup v. Winslet, 37 Ga. 655; Parkhurst v. Kinsman, 2 Blatchf. 78; Dougherty v. McDougald, 10 Ga. 121; Pignolet v. Bushe, 28 How. Pr. 9.

equity to the interposition of the court. The facts relied upon should be particularly set out,[1] and the bill and application should be verified.

Section 138. **Allegations of Mere Belief in the Facts are not Sufficient.**—An allegation of a mere belief in the existence of facts necessary to be established before the court will act, as a belief that a person in possession is insolvent, is not sufficient;[2] the petition or application must be verified in positive terms.[3] The verification must be such as, if untrue, would subject the affiant to the penalties of perjury.[4]

An imperfect verification may be supplied at the hearing by affidavits, etc.[5] Nor, in cases founded upon the fraudulent conduct of the defendant, or of danger to the property in controversy, will an allegation of such fraud or danger upon information and belief, generally be sufficient, unless the sources of the information are also set forth.[6] An allegation of the plaintiff's belief that the property in controversy will be wasted or destroyed, will not justify the court in granting a receiver. The grounds of such belief should be fully stated.[7] And allegations of the conclusions of law relied upon by plaintiff are equally ineffective in an application for a receiver. The facts upon which the conclusions of law are founded should be set out for the information of the court.[8]

Section 139. **Generally of the Sufficiency of the Bill and Application.**—It has been said that, for the appointment of a provisional receiver, it is not required that all the grounds be set forth in detail in the bill, as the appointment of such a receiver is only ancillary. It is necessary, however, that the bill disclose that the suit is one in which a provisional receiver may be appointed.[9]

"If the appointment of a receiver is but auxiliary to the pending action, to keep intact a fund sought to be reached and applied in satisfaction of a final judgment to be rendered, or to aid in carrying out the final object of the main action, the sufficiency of the complaint will not be tested on an appeal from an interlocutory order appointing a receiver, in so far as it relates to its sufficiency to

[1] Tomlinson v. Ward, 2 Conn. 396.

[2] Cofer v. Echerson, 6 Iowa, 502; French v. Gifford, 30 Iowa, 148.

[3] New South Building & Loan Association v. Willingham (Ga.), 18 S. E. R. 445; Siegmund v. Ascher, 37 Ill. App. 122; Grandin v. La Bar, 50 N. W. R. 151.

[4] Siegmund v. Ascher, 37 Ill. App. 122.

[5] Martin v. Burgwyn, 88 Ga. 78.

[6] Blondheim v. Moore, 11 Md. 365.

[7] Hanna v. Hanna, 89 N. C. 68.

[8] Heavilon v. Farmers' Bank of Frankfort, 81 Ind. 249.

[9] Wood v. First National Bank of Greenleaf, 41 Kans. 475.

entitle the party to the relief asked in the main action. In that respect it is under the control of the trial court, and may be amended at any time before final judgment. But the court will look to the complaint and test its sufficiency in so far as it relates to the appointment of a receiver, whether the appointment be auxiliary to the action, or whether the suit is being prosecuted for the sole purpose of appointing a receiver. There must be some application filed on behalf of the parties seeking the appointment of a receiver and invoking the power of the court to be exercised in their behalf. They must make out some plan of pleading, stating a case for the appointment of a receiver, that the opposite parties may know on what grounds the right to the receiver is claimed, and that they may know what they have to meet and defend against to prevent the appointment, and the pleadings in this behalf will bind and limit the inquiry. It will not do, we think, to dispense with all rules of practice in the appointment of receivers, any more than in any other class of legal proceedings. Tested, as it may be, and is in this case, in this court for the first time, the complaint will not be construed by any harsh and technical rule, but it must state generally a case for the appointment of a receiver, else it cannot be sustained."[1]

"The application is properly made on written motion or petition, either as a part of the complaint or cross-complaint, or as a distinct petition. No other pleading is necessary than the application itself. The application for the appointment of a receiver, however, as any other petition or complaint, should be sufficient in itself, and should, therefore, contain the allegations necessary to show why the prayer should be granted. * * * While, however, the allegations in the application for a receiver may be supplemented and enlarged by affidavits and oral testimony, yet the appointment cannot be sustained if the allegations fail to show statutory or equitable ground on which it may stand."[2]

The bill or application must state facts sufficient to show cause for the appointment of a receiver,[3] and should be verified. The bill may be used and serve the purpose of both a complaint and an application. In such a case it must contain all allegations essential to the appointment of a receiver.[4] But if the bill does not contain averments sufficient to warrant the appointment, it may be supple-

[1] Order of Iron Hall v. Baker, 134 Ind. 293.

[2] Sellers v. Stoffel (Sup. Ct. Ind.), 39 N. E. R. 52.

[3] Cook v. East Trenton Pottery Co. (N. J. Ch.) 30 St. R. 534.

[4] Bufkin v. Boyce, 104 Ind. 53.

mented by a separate petition or application, which differs from a motion for a receiver in that the latter is based on the bill, and moves the court to act upon it.

Usually the practitioner anticipates the remedy by appointment of a receiver and drafts the bill so that it contains all averments necessary to warrant the appointment; and then the practice is to move for a receiver, the motion being grounded on the bill.[1] But the appointment may also be sought by separate petition or application, filed in the suit.

Section 140. **Where the Bill Prays for a Receiver Without Notice—Insolvency.**—A bill praying for a receiver without notice to the party whose rights are to be affected, should set forth particularly the facts and circumstances relied upon to justify an *ex parte* exercise of this extraordinary power.[2] The affidavit of a party that he is satisfied of the necessity of such a proceeding is not sufficient.[3]

Although mere insolvency is not a sufficient ground to warrant a receivership, it is frequently urged as a reason for invoking the power of the court to preserve property from loss, damage, etc., and the application must not only show the plaintiff's cause of action, but also that a recovery is at least probable, and that his power to secure the benefit of a recovery will be either totally lost, or seriously impaired, by the insolvency of the defendant if a receiver be not appointed.[4]

Section 141. **Bill Against a Mortgagee.**—In a petition for the appointment of a receiver of mortgaged premises, in a foreclosure suit, the complainant must state that the premises are not of sufficient value to satisfy his debt and costs; and that the mortgagor, or other person who is personally liable for the payment of the mortgage debt, is irresponsible, or is unable to pay the expected deficiency. He must, also, show who is in possession of the mortgaged premises; because a receiver can only be appointed, where the person in possession of the mortgaged premises, by himself or his tenant, is a party to the suit.[5] In an action against a mort-

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[1] Hungerford v. Cushing, 8 Wis. 320; Nusbaum v. Stein, 12 Md. 315; Johns v. Johns, 23 Ga. 31; Tibbals v. Sargeant, 14 N. J. E. 449.

[2] Fricker v. Peters & Calhoun Co., 21 Fla. 254 (1885).

[3] Verplanck v. Mercantile Ins. Co. 2 Paige, 438.

[4] Gregory v. Gregory, 33 N. Y. Super. Ct. (1 J. & S.) 1, 39.

[5] Sea Insurance Co. v. Stebbins, 8 Paige, 565.

gagee in possession for an accounting, a receiver will not be appointed unless the bill alleges that he refuses to account.[1]

Where a defendant refused possession of a mill and machinery sold at sheriff's sale, a bill by the purchaser showing that the machinery would deteriorate if neglected, was held sufficient to justify the court in appointing a receiver for the property, until the purchaser could obtain possession.[2]

Section 142. **Decisions Under Statutes of North Carolina and Georgia.**— In North Carolina, to warrant the appointment of a receiver in supplementary proceedings, it is not necessary that it should appear with certainty that the debtor has property which ought to be applied to the payment of the judgment, but it is sufficient if there be reasonable ground to believe that he has such property.[3]

In order to take advantage of the statute of Georgia, giving a remedy by injunction and receiver to creditors of insolvent traders, it must appear that the defendant is insolvent, and that it would be of benefit to the complainant to have the relief prayed for.[4]

Section 143. **Of the Prayer in the Bill.**— While it is usual and, in fact, good practice to conclude a bill with a prayer for the appointment of a receiver, it often happens that the remedy becomes necessary in the progress of proceedings in which it was not sought, or contemplated, at the time of their inception, and the court will not, therefore, deny relief merely because such a prayer is wanting. It acts upon the case as made upon the motion for a receiver, using, however, the bill and answer to assist in ascertaining the facts. It is not, then, necessary that a specific prayer for the appointment of a receiver should be inserted in the bill;[5] and a receiver may be appointed at a final hearing in a proper case, even though there be no prayer for a receiver in the bill.[6]

Under a prayer for general relief a court of equity may grant any

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[1] Ohnsorg v. Turner, 13 Mo. App. 533, 544; affirmed, 87 Mo. 127.

[2] McFadden v. Nolan, 15 Phila. 187.

[3] Coates v. Wilkes, 92 N. C. 376, 380.

[4] Collins v. Myers, 68 Ga. 530.

[5] Commercial and Savings Bank v. Corbett, 5 Sawyer, 172; Bowman v. Bell, 14 Sim. 392; Wright v. Vernon, 8 Drew, 112; Henshaw v. Wells, 9 Humph. 568; Ladd v. Harvey, 21 N. H. 514; Malcolm v. Montgomery, 2 Mol. 500. *Contra*, Augusta Ice Co. v. Gray, 60 Ga. 344.

[6] Osborne v. Harvey, 1 Y. & Coll. Chan. 116; Merrill v. Elam, 2 Tenn. Ch. 513; Bowman v. Bell, 14 Sim. 392; Sage v. Memphis & Little Rock Railroad Co. 125 U. S. 361; Clyburn v. Reynolds, 9 S. E. R. 973; Chicago & South Eastern Railway Co. v. St. Clair (Sup. Ct. Ind.), 42 N. E. R. 225; Brinkman v. Ritzinger, 82 Ind. 358.

relief to which the complainant may be entitled under the allegations of the bill. Under the usual code provision any relief, consistent with the issues presented by the petition, may be granted, regardless of what the prayer may be, or whether there is, in fact, any prayer at all.

Section 144. **Defects in the Bill are not Fatal to the Application.**— Where a case is made out on the merits for the appointment of a receiver, the court will not refuse to appoint one on the ground of formal defects in the constitution of the suit, which can be cured by amendment.[1] In a case, therefore, where the secretary of a society had absconded with a large part of the funds, and persons claiming a lien on those funds filed a bill against the trustees to have the remaining funds secured by the court, and the loss made good by the trustees, and made out against the trustees a *prima facie* case of gross negligence as to the custody of the funds, a receiver was appointed, though the bill was open to objection for misjoinder of plaintiffs, multifariousness, and want of parties, and there was no allegation of insolvency, or of an intention to misapply the remaining funds.[2]

On an application to the supreme court of Alabama for a prohibition or other remedial writ, to vacate certain orders of the chancery court, in the appointment of a receiver, and the imprisonment of the petitioner for contempt of court, in refusing to pay over to the receiver certain moneys in his hands, the bill will not be examined and construed with the same degree of strictness, as to technical accuracy, as on demurrer, if it show that the court had jurisdiction of the parties and the subject-matter; although defective in some matter which might be supplied by amendment, it will be deemed sufficient, and a prohibition will not be awarded.[3]

Section 145. **The Same Subject Continued.**— The court will interfere, on an interlocutory application to appoint a receiver, notwithstanding grave doubts as to the propriety of the frame of the suit, and the necessity of making additional parties.[4] It has been held that a receiver may be appointed if the facts show the necessity for the relief, the proper parties being before the court, although the

[1] Evans v. Coventry, 31 Eng. Law & Eq. 436. See also Fripp v. Chard. Ry. Co. 21 Id. 53; Order of Iron Hall v. Baker, 134 Ind. 293.

[2] Evans v. Coventry, 31 Eng. Law & Eq. 436, s. c. 5 De G. M. & G. 911.

[3] *Ex parte* Walker, 25 Ala. 81.

[4] Fripp v. Chard. Ry. Co. 21 Eng. Law & Eq. 53.

application was for an injunction, and not for the appointment of a receiver.[1]

In a state where the statute provides that a receiver may be appointed in the action, etc., as in Kansas, all that the pleadings need disclose is that the action pending is one of a class in which the statute provides that a receiver may be appointed, and an averment that there is danger that the property will be wasted or injured before the answer or before trial is entirely unnecessary; the showing of the necessity for a receiver need not be in the petition, since a receivership is a provisional remedy and an auxilliary proceeding—not the end or object of the suit.[2]

Section 146. **Defects in Bill—Effect on Motion or Application for Receiver—Defects in Application.**—As the bill may be used and serve the purpose of both a petition and an application for the appointment of a receiver,[3] if it be used as the application, it must contain sufficient averments to warrant the appointment. But whether the appointment be sought by motion on the bill or separate application or petition, the appointment cannot be resisted because of defects in the bill affecting the merits of the suit, which may be remedied by amendment.[4] The motion or application for a receiver may be resisted for the reason that the bill discloses that the action cannot be maintained, and that the plaintiff will ultimately be defeated. As the appointment of a receiver is not and cannot be the sole purpose of the litigation, but is only provisional and ancillary thereto, the remedy must be engrafted on an action which, on the face of the bill, is well founded in respect to all matters not subject to amendment. Otherwise the appointment may be resisted by striking directly at the bill by demurrer or motion. If the court has not power to grant ultimate relief, it will not appoint a receiver.[5]

The application, by which we mean a pleading additional to the bill, must, of course contain all allegations necessary to warrant the appointment of a receiver. If it does not it may be attacked at

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[1] Whitney v. Buckman, 26 Cal. 447. See section 143.

[2] Hottenstein v. Conrad, 9 Kans. 435.

[3] See section 139.

[4] Order of Iron Hall v. Baker, 134 Ind. 293; section 139. "Ordinarily," it has been said, "the sufficiency of a complaint in an action in which a receiver is applied for, cannot be tested by demurrer, or otherwise, at the time of application or motion. * * * Pleadings and demurrers are not relevant to such an application." Bufkin v. Boyce, 104 Ind. 53. This assertion is correct only as to matters in the complaint that are answerable.

[5] People *ex rel.* v. Weigley (Ill.), 49 N. E. R. 800.

the hearing because of insufficiency.[1] If the bill be imperfectly verified the deficiency may be supplied at the hearing by new affidavit to the petition, or by the affidavits of persons other than the

III.

Of the Notice and Ex Parte Applications — at Chambers.

Section 147. **The Application at Chambers.**— For many purposes a court of equity is always open, and the authority of the judge at chambers is the authority of the court itself.[3] Of these purposes are the granting of the provisional writ of injunction and the appointment of receivers, powers which may be exercised by courts of equity in vacation.[4]

Where a statute authorized the appointment of a receiver under certain conditions by the "court," it was held that the statute meant the court in term time, and that the judge could not make the appointment in vacation at chambers.[5]

Section 148. **Of Notice of the Application — Necessity of Appointment without Notice — Exception to the Rule Requiring Notice.**— There is no principle of the law of receivership of greater wisdom and more firmly established than that requiring notice to be given to the defendant of the application for the appointment of a receiver to wrest from him the possession of his property.[6]

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[1] Section 139.

[3] Martin v. Burgwyn, 88 Ga. 78

[3] Caldwell, C. J., in Walters v. Anglo-American Mortgage & Trust Co. 50 Fed. R. 316.

[4] State ex rel. Merriam v. Ross, 122 Mo. 435; Parker, *in re*, L. R. 12 Ch. D. 293; Pelzer v. Hughes, 27 S. C. 408.

[5] Newman v. Hammond, 46 Ind. 119.

[6] Ruffner v. Mairs, 38 W. Va. 655; citing and approving text; Frendenhein v. Rohr, 87 Va. 764; LeGrand v. O'Neil, 2 Ir. Ch. N. S. 569; Moyers v. Coiner, 22 Fla. 422; State ex rel. Brittin v. City of New Orleans, 43 La. An. 829; Gilbert v. Block, 51 Ill. App. 516; Johns v. Johns, 23 Ga. 31; Nusbaum v. Stein, 12 Md. 315; Mays v. Rose, 1 Freem. (Miss.) 703; Tibbals v. Sargeant, 14 N. J. Eq. 449; Cleveland, Columbus, etc., R. R. Co. v. Jewett, 37 Ohio St. 649; Verplanck v. Mercantile Insurance Co. 2 Paige, 438; Sanford v. Sinclair, 8 Paige, 373; People v. Albany & Susquehanna R. R. Co. 7 Abb. Pr. N. S. 265; s. c. 55 Barb. 34; s. c. 38 How. Pr. 228; s. c. 1 Lans. 308; Devoe v. Ithaca & Owego R. R. Co. 5 Paige, 521; Van Rensselaer v. Morris, 1 Paige, 1; Field v. Ripley, 20 How. Pr. 26; Gibson v. Martin, 8 Paige, 481; McCarthy v. Peake, 9 Abb. Pr. 164; s. c. 18 How. Pr. 138; French v. Gifford, 30 Iowa, 148; Bisson v. Curry, 35 Iowa, 72; Howe v. Jones, 57 Iowa, 130. By statute in Iowa a receiver may be appointed in an action at law before notice. Jones v. Graves, 20 Iowa, 596; Maynard v. Railey, 2 Nev. 313; Hatton v. Lockridge, 27 W. Va. 428; Fricker v. Peters & Calhoun Co. 21 Fla. 254; Blondheim v. Moore, 11 Md. 365; Triebert v. Burgess, 11 Md. 452; Voshell v. Hynson, 26 Md. 83; Crowder v. Moone, 52 Ala. 220; Whitehead v. Wooten, 43 Miss. 523; Rogers v.

But the appointment of a receiver without notice is, never of itself, more than any irregularity — not void;[1] unless the court has not jurisdiction of either the subject matter of the suit or the parties.[2] The rule requiring notice is attended with no difficulty, either as to its understanding or application.

But the rule has an exception; for it is not under all conditions possible to give notice or safe for the applicant to await the lapse of time necessary for the service of notice. It is the exception to the rule that is confusing, and if it be properly understood the whole subject of notice will be lucid. A consideration of the judicial announcements upon the question will sufficiently present and explain it.

"It should be a very strong case," says the supreme court of Alabama, "substantiated by strong affidavit or affidavits of fact and urgency, to justify the appointment of a receiver and the dispossession of the owner of his presumptive right to control his own property, with no bond to compensate him for its wrongful seizure."[3] "It is of the very essence of a motion for the appointment of a receiver * * * that notice shall be given to the defendant of the time and place of the application; and it is only in an extreme case, such that the exigency of the case would be fatal, that a receiver can be justly appointed * * * without reasonable notice to the defendant."[4]

Dougherty, 20 Ga. 271; Caillard v. Caillard, 25 Beav. 512; Buxton v. Monkhouse, Coop. (*temp.* Eldon), 41; Lucas v. Harris, 56 L. J. (Q. B. D.) 15 (1886); Bristow v. House Building Co. 20 S. E. R. 947; Buckley v. Baldwin, 69 Miss. 804.

[1] Neeves v. Boos, 86 Wis. 313. In People *ex rel.* v. Judge of St. Clair County, 31 Mich. 456, it was declared that the appointment, *ex parte*, of a receiver to manage the corporate business was void because beyond the power of the court. But the assertion will, on examining the opinion, be found to be based not on the want of notice, but on the absence of inherent power in a court of equity to appoint a receiver of a corporation because of insolvency. See section 161

[2] See section 161.

[3] Dollins v. Lindsey, 89 Ala. 217. "It is only in the most urgent cases that a receiver should be appointed without notice." Little Warrior Coal Co. v. Hooper (Ala.), 17 So. R. 118. "The facts which justify the appointment of a receiver without notice to the party whose possession is disturbed, are exceptional at best. Nothing but the plainest showing of an imperative necessity for such an order, to prevent a failure of justice, should move a court to grant a motion to that end, though there is no hard and fast rule, that one can give, prescribing when the discretionary power to make such an order may or may not be used." St. Louis, Kennett & Southern Railroad Co. v. Wear, 36 S. W. R. 857. In this case failure to give notice was criticised as not justified on the showing that it would cause the officers of a railroad company to spirit away the books and resort to tricks to defeat the purpose of the appointment.

[4] Fredenheim v. Rohr, 87 Va. 764.

In a foreclosure proceeding this was said upon the question of notice of the application for a receiver: "The general rule is to proceed only after notice, but this rule is not infallible so as to prevent the court from proceeding in cases where it is impracticable to give legal notice — as in the case of absconding or non-resident defendants; but, subject to proper limitations the court may in such case proceed without notice, and leave the party to move to vacate the order if he chooses to come in and submit to the jurisdiction of the court."[1]

The decision of the supreme court of Ohio, reversing the order appointing a receiver of the Cincinnati, Hamilton and Dayton Railroad Company without notice, is refreshing and commendable in these days when courts are so much inclined to seize the property of corporations, and particularly of railroad companies, and in cases, too, when with notice, the application should not be granted. But the wrong is two-fold, when, without notice a court grants this extraordinary remedy of such harsh and drastic nature. "There was no obstacle," said the court, "to giving notice to the company before acting on the appointment of a receiver. No fraud or insolvency was charged against any of the parties; nor that the property of the company was in danger of removal beyond the jurisdiction of the court, or of otherwise being leased. The controversy was solely as to the fact of the attempted consolidation. Under these circumstances of the case, the appointment of a receiver was an unwarranted exercise of judicial power, which it is the duty of this court to reverse and set aside."[2]

The supreme court of West Virginia, has declared "it to be the better practice, and the one supported by the best authorities on the subject, to require notice to be given to the defendant before passing upon the application, unless it be in cases of great emergency

[1] Hangan v. Netland, 51 Minn. 552. Where a mortgagee became the purchaser at sale under the mortgage, and having brought action in ejectment to recover possession of the land, held he was entitled to an injunction to prevent the mortgagor and the person holding under him from fraudulently disposing of the crops, and for a receiver to take possession, gather and hold the crops; it being alleged that the land was not worth the amount of the mortgage debt, defendants were insolvent, and that they had removed and disposed of part of the crops; and that in such case receiver could be appointed without notice, receiver being required to execute a proper bond. A code provision authorized dispensing with notice on good reason shown the chancellor. Hennrix v. American Freehold Land Mortgage Co. 95 Ala. 313.

[2] Cincinnati, Hamilton and Dayton Railroad Co v. Jewett, 37 Ohio St. 649. The quotation given does not state all the essential facts warranting the appointment of a receiver without notice.

and imperative necessity."[1] Where the defendants were insolvent and disposing of the property in which the plaintiff claimed an equal interest, and were collecting and appropriating the proceeds of the sales, the appointment of a receiver without notice was declared to be justified.[2] But mere insolvency, without disposition of the property, is not cause for the appointment of a receiver without notice, which is only justified, said the court, " in a strong case of emergency and peril well fortified by affidavits."[3]

To justify the appointment of a receiver without notice to the opposite party the particular facts and circumstances rendering such a course proper should be set forth in the petition. The belief of plaintiff that if defendants were notified the books, records and papers of the bank would be falsified or spirited away, was held not sufficient.[4]

A receiver may be properly appointed without notice where the defendant has withdrawn from the jurisdiction of the court to prevent the service of process on him, and where such appointment is necessary to prevent the property of an absentee being wasted or moved beyond the court's jurisdiction.[5]

If the application for a receiver be by way of a motion in term time in a pending suit, it has been said that no notice thereof is required.[6] This presumably because the filing and docketing of the motion is presumed to give notice of its contents to the parties. This statement is not to be taken to justify the appointment of a receiver immediately on the filing of the motion, and the better practice is that special notice of the motion should be given.

To justify the appointment of a receiver without notice there must be a strong case of pressing emergency rendering immediate interference necessary before there is time to give notice; or it must be shown that notice will jeopardize the delivery of the property to which the receivership is to be extended.[7]

It has been said: " Where an injunction is ample to protect property until a motion can be made for a receiver, it is manifestly improper to deprive a party of possession without notice. * * * It is doubtless true that receivers are sometimes — though very rarely — appointed *ex parte*. * * * To justify such a summary

[1] Ruffner v. Mairs, 38 W. Va. 655; Bristow v. Home Building Co. 30 S. E. R. 947; Buckley v. Baldwin, 69 Miss. 804; Ashurst v. Lehman, 86 Ala. 370.

[2] Sims v. Adams, 78 Ala. 375.

[3] Thompson v. Power Manufacturing Co. 87 Ala. 733.

[4] French v. Gifford, 30 Io. 148. Facts, not conclusion must be stated. Nusbaum v. Locke, 53 Ill. App. 242.

[5] Sanford v. Sinclair, 8 Paige, 373.

[6] Ogden v. Choffant, 32 W. Va. 559.

[7] Bank of Florence v. United States Savings & Loan Co. (Ala.) 16 So. R. 110.

proceeding the facts and circumstances must create a very grave exigency; and, above all, the application must be of such a strong and convincing nature that the court is reasonably certain to decide the case finally in favor of the applicant."[1]

In a proceeding based on statute which requires notice to be given of the appointment of a receiver, except where the court or judge is satisfied that the defendant could not, with reasonable diligence, be found in the state, want of notice is fatal to the appointment, when the exception is not filled.[2]

The following quotation from an opinion of the supreme court of Alabama speaks correctly and clearly upon the topic under consideration: "As receivers are ordinarily appointed without requiring of the applicant bond indemnifying the other party against damages which may be caused by a wrongful appointment, the utmost care and circumspection should be observed in administering this extraordinary remedy. The court should ever be reluctant to summarily take property from the possession of a defendant claiming right or title thereto, and putting it into the control and management of an appointee of the court, without affording the claimant and possessor opportunity to be heard in opposition. * * * The exceptional cases are, when the defendant is beyond the jurisdiction of the ourt, or can not be found, or when some urgent emergency is shown rendering interference, before there is time to give notice, necessary to prevent waste, destruction or loss; or when notice itself will jeopardize the delivery of the property over which the receivership is extended, in obedience to the order of the court. * * * A mere suspicion, opinion or belief that defendants may spirit away the effects, and place them beyond the power of the court to compel delivery," does not excuse notice.[3]

The preceding judicial utterances clearly define the circumstances under which the appointment of a receiver may be properly made without notice to the defendant. Every inclination and tendency should be against granting the harsh remedy on an *ex parte* application, which should be denied, except in cases of absolute and imperious necessity, when, to refuse the application, would inevitably and certainly result in damage to the applicant.

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[1] Grandin v. La Bar, 50 N. W. R. 151.

[2] Grau v. Curtiss, 23 N. Y. S. 321.

[3] Mority v. Miller, 87 Ala. 331. It has been said that because some of the parties in interest were not before the court, and others had no notice of the application, was not a valid objection to the appointment. Micou v. Moses, 72 Ala. 440, 442.

Section 149. **Notice not Necessary in Certain Cases.** — It has been held that a defendant who is in contempt, although he may have appeared in the action, is not entitled to notice of motion for a receiver,[1] and that when counsel for the opposition are present in court and resist the motion for a receiver, it will be presumed that sufficient notice of the application has been given.[2] So where a defendant filed an affidavit in reply to the plaintiff's affidavits in support of his motion, it was looked upon as an entry of appearance for the purposes of the motion.[3]

A motion for the appointment of a receiver to take control of the assets and wind up the affairs of a bank, will be denied as irregular, if it appear that the order to show cause against the appointment was served before the action was commenced.[4] But where a judgment-debtor, by an order to show cause, moved to vacate an order appointing a receiver in supplementary proceedings, on the ground that no personal notice had been given him of the application for such appointment, and the plaintiff thereupon served a notice that, in the event of the vacating of the original order on the hearing of the motion, a motion would be made on behalf of the plaintiff for the appointment of a receiver, it was held that the counter-notice was proper and the appointment of a second receiver, upon vacating the appointment of the first, was authorized.[5]

Section 150. **Of the Circumstances Generally Under Which Notice Will be Dispensed With.**— The exceptional circumstances under which notice of the motion, or other form of application, for the appointment of a receiver will be dispensed with, and an *ex parte* proceeding allowed, are confined principally to such emergencies as require the immediate action of the court in order to thwart efforts to commit fraud or to preserve the property in controversy from threatened, impending and irreparable loss or damage; to cases where from the peculiar situation or attitude of the defendants or parties interested in the property, it is impossible to give the notice or is inadvisable to allow the time requisite to give notice to elapse before the relief can be granted, or where there is danger of injury being done to the property by the defendants or others, if they have knowledge of the application; and to cases where the

[1] Fitzpatrick v. Hawkshaw, 1 Hog. 82. But see Mead v. Norris, 21 Wis. 310.

[2] McLean v. La Fayette Bank, 3 McLean, 503.

[3] Vann v. Barnett, 2 Bro. C. C. 158.

[4] Kattenstroth v. The Astor Bank, 2 Duer (N. Y.), 632.

[5] Clark v. Clark, 11 Abb. N. C. 333 (New York City Ct. 1882).

defendants, or interested parties, have absconded, or otherwise evade the process of the court.

Section 151. **General Statements Upon This Subject by the Courts.**[1] — The exceptional cases in which the court will depart from its general rule of requiring notice of the application to be given to the parties in interest, as above collected in a general way, have been stated by the courts as follows:

A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable,[2] and the appointment will not be made without notice save in case of irreparable impending injury.[3] A receiver will not be appointed without notice to the defendant before the time for his appearance has expired, unless he has withdrawn himself from the jurisdiction, or the property be in danger of being lost, or some other special circumstances exist making an immediate appointment of a receiver necessary.[4] A receiver may be appointed without notice to the defendant where there is danger of serious loss from delay, if the defendant be out of the state, and have no residence or place of business where the subpœna can be served, saving to the defendant the right to apply for relief against the order on showing sufficient cause.[5] It seems that a receiver should not be appointed *ex parte*, except in cases where it is clearly shown that the delay resulting from giving notice would defeat the rights of the complainant, or result in great injury to him.[6] A receiver should not be appointed without notice to the party whose property is to be affected, except in cases of the gravest emergency demanding the immediate interference of the court for the prevention of irreparable injury.[7] An order for a receiver ought not to be made on an *ex parte* application, even after judgment, except in cases of emergency.[8]

Section 152. **Notice is Not Required when it Cannot be Given.**—If a defendant have absconded for the purpose of avoiding service of process, the application will be entertained without notice,

[1] This section cited and approved in Ruffner v. Mairs, 38 W. Va. 655.

[2] Mays v. Rose, 1 Freem. (Miss.) 703.

[3] Johns v. Johns, 23 Ga. 31; Cleveland, Columbus, etc. R. R. Co. v. Jewett, 37 Ohio St. 649.

[4] Sanford v. Sinclair, 8 Paige, 373; Gibson v. Martin, 8 Id. 481; Field v. Ripley, 20 How. Pr. 26; McCarthy v. Peake, 9 Abb. Pr. 164; s. c. 18 How. Pr. 138.

[4] Van Rensselaer v. Morris, 1 Paige, 1.

[6] Maynard v. Railey, 2 Nev. 313

[7] Frickers v. Peters & Calhoun Co. 21 Fla. 254.

[8] Lucas v. Harris, 56 L. J. (Q. B. D.) 15 (1886).

service of process or entry of appearance.[1] On the other hand if it does not appear that defendant left the country to avoid service of process, and no other sufficient cause is shown, an *ex parte* application will be refused.[2] If the defendant has left the state and there is no prospect of his speedy return, and no one is authorized to represent him, and there is a necessity for immediate action, the application may be made without notice.[3] And so also where he is out of the jurisdiction of the court, or cannot be found, and the immediate interference of the court is necessary to prevent the destruction or loss of property.[4] And where a receiver was appointed upon a bill filed in the court of chancery in New Jersey against a bank, and *subpœna ad respondendum* was returned by the officer not served, with his affidavit that he could not find any officer of the bank in his county, it was held, in an action brought by the receiver in New York, that the appointment was valid because the return and affidavit left the court at liberty to appoint a receiver without notice to the bank.[5] Where an absent defendant has been advertised to appear within a certain time, an order for the appointment of a receiver, obtained by the plaintiff *ex parte*, before the expiration of the time limited for the defendant's appearance, is irregular, except under special circumstances.[6]

Section 153. **Notice to a Non-Resident Defendant is Not Necessary.**—In a case where a non-resident trustee had been, for several years, in possession of the property of a debtor, which had been conveyed to him for the benefit of creditors, and he had made no payments, a receiver was appointed, upon the application of a creditor, without notice to the trustee and without his appearance in the action.[7] Under the former chancery practice in New York, the court would appoint receivers in partnership cases without notice to a non-resident partner;[8] and it was held in that state that a receiver should not be appointed of property in another state, belonging to a person who had not been brought within the jurisdiction of the court.[9]

[1] Dowling v. Hudson, 14 Beav. 423; Maguire v. Allen, 1 Ball & B. 75. In the latter case a notice was served upon the defendant's law agent and upon tenants. See Gibbons v. Mainwaring, 9 Sim. 77; Williams v. Jenkins, 11 Ga. 595.

[2] Stratton v. Davidson, 1 Russ. & M. 484.

[3] People v. Norton, 1 Paige, 17.

[4] Verplanck v. Mercantile Ins. Co. of New York, 2 Paige, 438.

[5] Dayton v. Borst, 7 Bosw. (N. Y.) 115.

[6] Sandford v. Sinclair, 3 Edw. Chan. (N. Y.) 393.

[7] Malcolm v. Montgomery, 2 Mol. 500.

[8] People v. Norton, 1 Paige, 17; Verplanck v. Mercantile Ins. Co. 2 Id. 438; Bloodgood v. Clark, 4 Id. 574.

[9] Field v. Ripley, 20 How. Pr. 26.

Section 154. **Decisions on this Subject in New York and Iowa.**—Under the code of procedure of New York a receiver may be appointed over partnership property, in an action for dissolution, without notice to a non-resident partner, when the resident partners appear.[1] Where a statute authorized the court to appoint receivers upon such notice as it might prescribe to parties interested, who were not within the jurisdiction of the court, as in Iowa, it was decided that an appointment might be made without any notice, if it were necessary to prevent serious loss.[2]

Section 155. **Notice as Between Landlord and Tenant.**—Where an order is made by a court of equity appointing a receiver and requiring the tenant to deliver possession to him, if the landlord be not a party to the action in which the order was made, the tenant may be required to show that he gave him notice, or that the order was rightfully made. But if the landlord be a party, he is estopped from denying, as between him and his tenant, the validity of the order, unless it were made with the tenant's consent.[3]

Section 156. **Instances of Facts Deemed Insufficient to Justify Ex Parte Proceedings.**—In a case where the defendants were merchants residing in the same city where the court was held, and were engaged in business there, and a receiver had been appointed over their property in an *ex parte* proceeding, without a showing of absolute necessity for haste, the action of the court was reversed on appeal.[4] Similarly, where a receiver was appointed on an *ex parte* application, late at night, and he made a sale of property early the next morning, the order of appointment was vacated, and the sale set aside, as having been fraudulently obtained.[5]

In Maryland it has been held that the fact that an order of appointment of a receiver was made on an *ex parte* application on the same day the bill was filed is sufficient cause for reversing the action of the court below.[6] Where a bill was filed by stockholders to wind up the concerns of a corporation, on the ground of an alleged violation of the charter, and no necessity was shown for immediate action, the order appointing a receiver, without notice first given, was reversed on appeal to the chancellor.[7]

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[1] Alford v. Berkele, 29 Hun, 688.

[2] Maish v. Bird, 59 Iowa, 307.

[3] Mariner v. Chamberlain, 21 Wis. 251.

[4] Triebert v. Burgess, 11 Md. 452.

[5] Simmons v. Wood, 45 How. Pr. 268.

[6] Nusbaum v. Stein, 12 Md. 315.

[7] Verplanck v. Mercantile Ins. Co. 2 Paige, 438, 450.

Section 157. **The Form and Service of the Notice.**— The notice is to be served like ordinary notices, and, while it is the settled practice not to entertain a motion for the appointment of a receiver until the defendant has had notice, if it be practicable to give one, yet if it expressly appear in the bill that a defendant upon whom notice was served was the authorized agent of the principal defendant, managing and controlling the property over which a receiver is asked for, the notice will be considered sufficient as to his principal.[1] When affidavits are used, they should, of course, verify such facts and circumstances as are deemed to constitute the necessity for the appointment, and a copy of them be served with the notice, or in due time before the hearing. It must express, shortly but clearly, the object of the application; for in general the court will not extend the order beyond the notice.[2] It should also state on what papers and pleadings the motion will be grounded. If the papers to be used are already in the possession of the party, or are on file or of record in the court, they can be referred to in the notice, and copies need not be served.[3]

A motion for the appointment of a receiver will be denied as irregular, when the order to show cause against the appointment is served before the commencement of the suit.[4] A suit must have been commenced before any steps are taken toward the appointment of a receiver.

A plaintiff can move on his bill, and on affidavits besides; and the defendant, in such case, may use his answer as an affidavit,[5] or he may read depositions in reply to the plaintiff's affidavits. A rehearing cannot be had on a motion for a receiver, since it does not involve the merits, and relates only to the preservation of the property.[6] But on new facts the application may be renewed

Section 158. **Notice Under the New York Code.**— By the New York code of civil procedure, notice of an application for the appointment of a receiver in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action and the time limited for his appearance has expired. But

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[1] Mays v. Rose, Freeman (Miss.) 703, 720. See also Maguire v. Allen, 1 Ball & B. 75.

[2] 1 Grant's Ch. Pr. 144.

[3] 1 Hoffm. Ch. Pr. 422; Hungerford v. Cushing, 8 Wis. 320.

[4] Kattenstroth v. Astor Bank, 2 Duer. (N. Y.) 632.

[5] Goodman v. Whitcomb, 1 Jac. & Walk, 569; Kershaw v. Matthews, 1 Russ. 361.

[6] Sheldon v. Weeks, 2 Barb. 532. And see Chapman v. Hammersley, 4 Wend. 173.

where an order has been made for service of summons by publication, the court may, in its discretion, appoint a temporary receiver to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as it thinks proper.[1]

Section 159. **Notice Under Special Statutes in West Virginia and Michigan.**— In West Virginia, by statute, no receiver can be appointed of any real estate, or of the rents, issues and profits thereof, until reasonable notice of the application therefor has been given to the owner or tenant thereof.[2]

The provision of the laws of Michigan (Comp. Laws of Mich., § 6565) for the sequestration of corporate property and for the appointment of a receiver, does not contemplate that an appointment shall precede an adjudication, or that the adjudication shall precede a hearing on notice.[3]

Section 160. **Service of Process not Necessary Before Application.**— The authorities are not uniform on the question whether there must be service of process in the case, as well as of the notice of application, before an application will be entertained. In England, under the chancery practice, the notice of motion might be served upon the filing of the bill before service of process or entry of appearance;[4] and this practice seems to be essential to the full and free exercise of a remedy which was created for, and is adapted to, the administration of justice in emergencies, and under circumstances requiring special and peculiar relief.

But in Mississippi it was said: "It cannot well be seen how the court can take from a defendant the possession of property, unless it has jurisdiction by service of process and also by notice of motion."[5]

Where a statute provided "that receivers shall not be appointed * * * until the adverse party shall have appeared and answered, * * * or had reasonable notice of the pendency of the action and the application for such appointment," it was held that a prayer in the bill for such relief was sufficient notice, and, on appeal, the court refused to reverse the order of appointment for want of any other notice of the application.[6]

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[1] N. Y. Code Civ. Pro. § 714.

[2] Warth's Code, ch. 133, §2 8, p. 742; Hatton v. Lockridge, 27 W. Va. 428.

[3] Cook v. Detroit & Michigan R. R. Co. 45 Mich. 453.

[4] Meaden v. Sealey, 6 Hare, 620.

[5] Simrall, J., in Whitehead v. Wooten, 43 Miss. 523. In Hylsop v. Hoppock, 5 Benedict, 447, a motion for a receiver was refused because the defendant was not served with process, but it does not appear that any notice of motion was served.

[6] Newell v. Schnull, 73 Ind. 241.

As the application and appointment of a receiver may be made at any time after the commencement of the suit,[1] it follows logically that the application may precede the service of process; and such is the every-day practice.

Section 161. **Validity of Appointment without Notice — Presumption as to Notice — Objecting to Want of Notice.** — The appointment of a receiver without notice is entirely a matter of judicial discretion. The power to make the appointment without notice is inherent in a court of equity. It follows logically that want of notice does not affect the validity of the appointment in reference to whether it be void, but merely concerns it as being the proper or improper exercise of sound and judicial discretion. An abuse of such discretion would merely render the appointment erroneous, subject only to direct and not collateral attack.[2]

In several cases courts have declared the appointment of receivers without notice void; but the assertions were not made in the abstract, but in connection with other facts showing want of power in the courts to appoint receivers even with notice. For instance it was held by the supreme court of Michigan that the appointment, without notice, of a receiver of a corporation on the ground of insolvency was void; but for the reason that, in the absence of statutory authority, the court was without power to appoint a receiver of a corporation for such cause.[3]

When a statute requires notice of the appointment, failure to give notice will render the appointment void.[4]

If the record is silent as to notice of the application for a receiver the appellate court, it has been said, will presume notice was given.[5] A very violent and unreasonable presumption.

It has been said that no advantage can be taken of the appointment of a receiver without notice, except on an appeal from the order.[6]

IV.

Affidavit Accompanying the Application.

Section 162. **Of the Affidavits Generally.**—Usually the motion for the appointment of a receiver is and should be founded on affidavits, or other papers, copies of which should be served with the

[1] Section 122.

[2] Neeves v. Boos, 86 Wis. 313.

[3] People *ex rel.* v. Judge of St. Clair County, 31 Mich. 456; Turgean v. Brady, 24 La. An. 348; Ober v. Excelsior Planting & Manufacturing Co. 10 La. R. 792.

[4] Grace v. Curtiss, 23 N. Y. S. 321.

[5] Miller v. Shriner, 86 Ind. 493; Gibson v. Martin, 8 Paige, 481.

[6] Voshell v. Hynson, 26 Md. 83.

notice of the motion or other form of application; but if the papers on which the party intends to rely have already been filed in the case, it is sufficient if reference be made to them in the notice.[1] At the hearing of the motion the plaintiff should not be permitted to read affidavits which have not been served on the opposite party,[2] unless the latter be given due time and opportunity to meet them. In a case in which a motion to continue a party in possession of property in litigation was made, it was held that such motion was not a motion for the appointment of a receiver, and as no proof had been adduced to show its propriety, the order entered thereon was declared to be irregular and was reversed.[3] Although, on a motion for a receiver, affidavits may be read in support of the complaint or bill, still they cannot be read to enlarge the case made by it.[4]

Section 163. **The Affidavits Should be Clear and Positive.**— The affidavits in support of a motion for a receiver should relate distinctly and precisely to the facts depended upon. An affidavit, made upon information and belief, that a party is of little or no responsibility has been held not to be sufficient to satisfy the court of his insolvency.[5]

In Maryland, in view of long established practice, an affidavit, "according to the best knowledge and belief" of the affiant, has been held to be a sufficiently positive assertion of the truth of the facts stated, to justify the court in appointing a receiver.[6]

Where fraud is relied upon as the ground of relief, the allegations of the facts constituting the fraud should be made with special fullness and care. So where the affidavits contained merely general allegations as to the belief of the affiants that great frauds had been committed against a corporation over which a receivership was asked, and did not state by whom they were committed, or in what they consisted, the application was refused.[7] This rule is relaxed, however, in favor of officers who, by statute, upon the insolvency of a banking corporation, are required to apply for a receiver to wind up its affairs, since only the officers of the bank can swear positively to its condition. In such a case it has been held that an information, filed by an attorney-general, alleging the facts upon information and

[1] Hungerford v. Cushing, 8 Wis. 320.

[2] Brundage v. Home Savings and Loan Associatien (Wash.), 39 Pac. R. 666; Jacobs v. Miller, 10 Hun, 230.

[3] Ibid.

[4] Hayes v. Heyer, 4 Sandf. Chan. (N. Y.) 485, 487.

[5] Darcin v. Wells, 61 How. Pr. 259.

[6] Triebert v. Burgess, 11 Md. 452.

[7] Oakley v. Paterson Bank, 2 N. J. Eq. 173.

belief, was sufficient.[1] Ordinarily it is sufficient if the facts upon which the application be based are verified by the affidavit of the plaintiff alone.[2]

The affidavits must be in terms sufficiently clear and positive as, if untrue, to subject the affiant to the penalties of perjury.

Section 164. **Affidavits on Appeal.**—Copies of the affidavits and testimony used upon the hearing of the motion, should go with the record to the appellate court in those states where, by the local practice, such court hears and decides, upon the merits, appeals from orders appointing receivers;[3] and in Indiana, it has been decided, that, upon such an appeal, only those affidavits which are properly incorporated in the record, as by a bill of exceptions, can be considered on the hearing in the appellate court.[4]

Section 165. **Use of Answer as Affidavit—Effect of Verified Answer.**—The answer being a defendant's principal pleading and the formal statement of his defense to the allegations contained in the bill, has especial weight in influencing the action of the court on applications for the appointment of receivers. A sworn answer, denying all the equities contained in the bill, amounts in practice, on the hearing of such applications, to a *prima facie* case in favor of the defendant, and, where such an answer is filed, the application will be refused unless the plaintiff introduce, in support of his bill, such evidence as will overcome the denials of the answer.[5] The reason for this rule has been stated to be that "the plaintiff, having addressed himself to the conscience of the defendant, has made him a witness, and must take his answer as true, unless he can overcome it."[6]

So fully is this rule recognized that it has been held, in North Carolina, that an appointment of a receiver, after full denials in an answer under oath, is judicial error subject to reversal by the higher

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[1] Attorney-General v. Bank of Columbia, 1 Paige, 511.

[2] Jones v. Dougherty, 10 Ga. 273.

[3] Schlecht's Appeal, 20 Pa. St. 172.

[4] Barnes v. Jones, 91 Ind. 161.

[5] Simmons v. Henderson, 1 Freem. (Miss.) 493; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Buchanan v. Comstock, 57 Barb. 581; Fairbairn v. Fisher, 4 Jones' Eq. (N. C.) 390; Callanan v. Shaw, 19 Iowa, 183; Rhodes v. Lee, 32 Ga. 470; McCandless v. Warner, 26 W. Va. 754; Thompsen v. Diffenderfer, 1 Md. Ch. 489; Connor v. Allen, Harring (Mich.) 371.

Text cited and approved in Whitehouse v. Point Defiance, Tacoma & Edison Railway Co., 9 Wash. 558; s. c. 38 Pac. R. 152.

The defendant may use a sworn answer as an affidavit. Rheinstein v. Bixby, 92 N. C. 307.

[6] Thompsen v. Diffenderfer, 1 Md. Ch. 489, 496.

court;[1] and in a case where such an answer was filed after a receiver had been appointed, the receiver was discharged, the chancellor saying: "A case was, I thought, made out by the bill, but the answer has overthrown it, and the hand of the court must be removed."[2]

On the other hand the presumptions, arising from the answer against the defendant, are equally effective, and it has deen decided that where, from the answer itself, there is a strong presumption against the defendant's title, which is impeached by the bill, the court will grant a receiver.[3]

Section 166. **In Applications Before Answer Defendant May be Heard Upon Affidavits.** — If the application for a receiver be made before the defendant has filed his answer, and the case be urgent, the defendant may be heard upon affidavits by way of defense to the application;[4] or, if he prefer, he may make a motion for a rehearing of the application, or a motion for the discharge of the receiver after he is appointed, when he will be allowed to introduce proofs which could not be produced on the former hearing.[5] But if the application be made after the filing of the answer by the defendant, the court will allow affidavits to be read on behalf of the application, so that it may have before it the facts necessary to a proper disposition of the motion.[6]

Section 167. **Of Rehearing an Application for a Receiver.** — If, however, the courts be forbidden by statute to rehear motions made in the progress of the cause, the decision of which does not go to the merits, a motion for a receiver in a creditor's suit will not be reheard, since it is merely incidental to the principal relief sought, and does not involve the merits of the action.[7]

A defendant may waive his right to an objection against the appointment of a receiver, by not bringing the fact upon which the objection is founded to the notice of the court when he was in possession of it, and it was vital to the matter to be determined.[8]

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[1] Fairbairn v. Fisher, 4 Jones' Eq. (N. C.) 390.

[2] Drury v. Roberts, 2 Md. Ch. 157. See also Voshell v. Hynson, 26 Md. 83.

[3] Payne v. Atterbury, Harring. (Mich.) 414.

[4] Kean v. Colt, 5 N. J. Eq. 365; Micou v. Moses, 72 Ala. 439. By the Irish practice the plaintiff may use affidavits to explain imperfect statements in the answer. Bell v. M'Loghin, Flan. & K. (Ir.) 272.

[5] Phœnix Mutual Life Insurance Co. v. Grant, 3 MacArthur (D. C.), 220; Belmont v. Erie Ry. Co 52 Barb 637.

[6] Ladd v. Harvey, 21 N. H. 514.

[7] Sheldon v. Weeks, 2 Barb. 532.

[8] Clark v. Clark, 11 Abb. N. C. 333.

V.

Of the Reference to a Master.

Section 168. **Reference is Not Now Generally Made.**—By the former pactice in the English court of chancery, which was followed by the New York court of chancery, the usual course was for the chancellor to enter an order, referring the matter to a master to make proper investigations and report a proper person to be appointed receiver, or to make an appointment. While this course is no longer the usual one pursued in this country, there seems to be no objection to a resort to it if the court for any reason sees fit to do so; and a brief statement of the decisions relating to it may, therefore, be of service to the practitioner.[1]

Section 169. **Proceedings Before the Master or Referee.**— The master, or referee, having, by means of the same powers as to process which he may exercise in other cases, secured the attendance of the parties interested, or having ascertained that they have been duly summoned, the party who has obtained the order of reference should hand in a written proposal, containing the names of the intended receiver and his sureties, with a short description of the property. But if the person thus nominated for receiver be objectionable, any other person may be nominated by any interested party, by a counter-proposal, and the master, or referee, decides between them.[2] He should appoint the person whom he thinks the most fit, without regard to the party who has proposed or recommended him.[3] But if the parties are equally interested in the funds, and the persons proposed on both sides are equally unobjectionable, the party who has entered the order has, *prima facie*, a right to the preference.[4]

In Maryland it was held that the recommendation of a creditor, coming in under a creditor's bill by petition, is entitled to consideration, in making the appointment of a trustee to sell the property sought to be subjected, although the validity of his claim had not been determined upon; but, where the amount of his claim did not appear by the petition, the recommendation of the original complainant would have most weight.[5]

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[1] In Alabama it is proper to refer the matter of selection to the register: *Ex parte* Morgan Smith, 23 Ala. 94, 110.

[2] Bennett's Master, 95.

[3] Lespinasse v. Bell, 2 Jac. & Walk. 436.

[4] Smith on Receivers, 8.

[5] Watkins v. Worthington, 2 Bland's Chan. 509.

The English court considered it important that the judgment of the master in recommending a person for receiver should not be interfered with.[1]

Section 170. **Proceedings under the Former Chancery Practice in New York.**— In New York, under the old chancery practice, it was decided that, where a master was directed to appoint a receiver, his report of the appointment needed no order of confirmation, and such a report could be excepted to; that if either party was dissatisfied with the appointment of a receiver by a master, under an order for that purpose, his proper course was to present a petition to the court, upon notice to all parties who have appeared and have an interest in the appointment, stating the grounds of objection, and praying that the master might review his report, and that the court would not interfere with the decision of a master appointing a receiver, unless the person so appointed was legally disqualified, or his situation was such as to make it probable that the interests of the parties would not be preserved by him.[2]

Under the English practice, when a reference was had to a master with directions to appoint, objections to the master's action were taken by exceptions to his report.[3]

In creditors' bills the court uniformly directed the reference for the appointment of a receiver to a master, near the residence of the defendant, except under special circumstances, rendering the appointment of some other master necessary.[4]

Upon a reference to a master, in a creditor's bill, to appoint a receiver of the property of the defendant, a direction to the master to examine witnesses as to any matters charged in the bill, except the nature and extent of the defendant's property, was held to be erroneous.[5]

VI.

Of the Order of Appointment.

Section 171. **How the Order is Drawn and Entered.**— When the motion for a receiver has been allowed, care should be taken in drawing the order for his appointment, that it contain and explain fully his powers. The party who properly moves for the order, is

[1] Sutton v. Jones, 15 Ves. 584.

[2] Matter of Eagle Iron Works, 8 Paige, 385.

[3] Creuze v. Bishop of London, Dick. 687.

[4] Bank of Monroe v. Keeler, 9 Paige, 249.

[5] Copous v. Kauffman, 8 Paige, 583.

entitled to draft it. If such order be special in any of its provisions, the party entitled to draw it up should submit a copy to the adverse solicitor in order to enable him to propose amendments. The draft and the amendments, if any, are then to be delivered to the clerk, so that the order may be settled by him and entered, and if he cannot understand the decision of the court, so as to be able to settle the order in conformity therewith, he may apply to the court to settle it.[1]

In order to limit the time in which an appeal may be taken, in states where appeals from such orders are allowed, a copy of the order, or a formal notice of its entry, should be served upon all interested parties.[2]

Section 172. **The Order Should Clearly Designate the Property to be Placed in the Receiver's Charge.**—The order "ought to state so distinctly, on the face of it, over what property the receiver is appointed, that a party may know what it is that the officer of the court is in possession of,"[3] as was said by Lord Langdale, in a case where the order appointed a receiver "of the incomes of the outstanding trust property in the pleadings mentioned," and not of the rents of the estate out of which they were issuing.[4] It is said that the order may refer to the pleadings or to some document in the cause, which describes the property.[5] A mere order that the receiver shall be appointed to take charge of certain goods, does not place such goods in *custodia legis*.[6] An order directing to be delivered to the receiver "the goods, wares and merchandise and effects" of the defendant, when his agreement, as stated in the bill, was that he would give a mortgage "of all his stock in trade" in a certain city, is erroneous, because too comprehensive.[7] It may, in describing the property of which the receiver is to take possession, make an exception of property already in custody under the writ or order of some other court.[8]

Section 173. **Interpreting the Order—Advice of Court.**—In a recent case in which a receiver, who was appointed for a corporation "with the power to take possession of all property of the defendant in whose possession soever it may be found, except it may be in

[1] Whitney v. Belden, 4 Paige, 140.

[2] Tyler v. Simmons, 6 Paige, 127, 132.

[3] Crow v. Wood, 13 Beav. 271; O'Mahoney v. Belmont, 62 N. Y. 133.

[4] Crow v. Wood, *supra*.

[5] Daniell's Chan. Plead. & Prac. (5th Am. Ed.) 1737.

[6] Dutcher v. Culver, 24 Minn. 584.

[7] Triebert v. Burgess, 2 Md. 452.

[8] For an instance of such an exception see Edrington v. Pridham, 65 Texas, 612 (1886), quoted below.

custody under the writ or order of some other court," presented the order to its treasurer and demanded the funds of the corporation in his hands, which the treasurer declined to deliver on the ground that the order was not sufficiently specific to justify him in so doing, it was held, on an application of the receiver for an order upon the treasurer to show cause why he should not pay over the funds or be punished for contempt, that if, in making the appointment the court proceeded upon an insufficient showing, the order was erroneous and subject to revision, but not void nor open to collateral attack, and that the treasurer, having notice of the order, was bound in duty to obey it and turn over to the receiver, on demand, the company's property, which included money in his possession. In this case the court said: "A decent respect for the authority of the court would have dictated the propriety of an appeal to it for the solution of any real doubt as to the extent of the order. For an agent of the company to act upon a questionable and technical construction of the words of the order, and place himself in a position in which he cannot comply if it is determined that his interpretation is wrong, is rashly contemptuous. That he has proceeded under the advice of counsel may mitigate, but cannot excuse the offense.[1] He, nevertheless, knew that he was disobeying the order, unless its true intent should happen to be his restrictive interpretation."[2]

Section 174. **Stipulations as to the Terms of the Order.**—A stipulation of the parties upon which a receiver is appointed may define his powers and duties, but leaves him still amenable to the court in the exercise and performance thereof, exactly as in the exercise and performance of powers and duties fixed by the order of appointment and the rules and practice of equity. Thus it cannot relieve him from the duty of rendering detailed accounts if either party any time call for them.[3]

Section 175. **Provisions Relating to Prior Encumbrances.**—If the receiver be appointed on behalf of one of several encumbrancers, the order generally contains a declaration that the appointment of the receiver is to be without prejudice to the rights of, or is not to affect, the prior encumbrancers upon the estate who may think proper to take possession of the estate and premises, by virtue

[1] Cape May, etc., R. R. Co. v. Johnson, 35 N. J. Eq. 422; Smith v. Cook, 39 Ga. 191; Capet v. Parker, 3 Sandf. Sup. Ct. (N. Y.) 662.

[2] Edrington v. Pridham, 65 Texas, 612, 616 (1886), citing Dean v. Thatcher, 32 N. J. Law, 470; Woods v. Blythe, 46 Wis. 650; Lanshaw v. Tracy, 4 Biss. 490.

[3] Hooper v. Winston, 24 Ill. 353.

of their respective securities; and usually directs an inquiry as to what encumbrances there are affecting the estate, and the priorities thereof respectively; and orders that the receiver, out of the rents and profits to be received by him, keep down the interest and payments in respect of such encumbrances, according to their priorities, and be allowed the same in passing his accounts.[1]

Section 176. **Miscellaneous Requirements.**— The order usually directs the receiver to pass his accounts from time to time, and to pay the balances found due from him into court, to the credit of the cause; to be there invested and accumulated, or otherwise, as may be directed.[2]

It is competent for courts of chancery to appoint a receiver to institute suits in his own name for the recovery of assets belonging to suitors in equity.[3] It would be improper for a court of equity to take part of the estate from one executor and give it to a receiver for the purpose of enabling him to co-operate with the other executor. A receiver must be of the whole estate.[4]

Where an order of appointment is made on an application without notice, on account of the absence of defendant from the state with no immediate prospect of his return, it should reserve to him the right to apply for relief against it upon cause shown.[5]

Section 177. **An Order Construed to be an Appointment of Receivers.**— Where, in an action to foreclose a mortgage, the president and directors of a railroad company were ordered to continue in the possession and management of its property of all kinds, under the order of and subject to the court, and such officers were in like manner to conduct and carry on the business of the company, and to make report to the court, when required, of the condition of the property of the company and of its earnings and expenditures, to the end that such orders might be moved for as were necessary for the protection of the property of the company, and the interest of all parties concerned, it was held that this order constituted the president and directors, and their successors, receivers of the court, and that they continued the management of the road as officers of the court and not of the company.[6] In this case it was also held that one who purchased, from the president and directors, on new

[1] Lewis v. Lord Zouche, 2 Sim. 388, 393.

[2] Daniell's Chan. Plead. & Prac. (5th. Am. Ed.) 1737.

[3] Hardwick v. Hook, 8 Ga. 354.

[4] Fairbairn v. Fisher, 4 Jones' Eq. (N. C.) 390, 394.

[5] People v. Norton, 1 Paige, 17.

[6] Gibbes v. Greenville & Columbia R. R. Co. 15 S. C. 304 and 518.

and ample consideration, certain bonds which were a part of the assets of the railroad company, without knowledge or notice of the official character of such officers as receivers, or of the trust imposed upon them, was not liable to the creditors of the corporation for the value of the bonds.[1]

Section 178. **Recitals in Orders Construed — Alternative Orders.**— An order by which a receiver was appointed to "take charge of, manage and sell the goods of the late firm, and apply the proceeds of said sale to the payment of the debts of" the firm, was held to "go much too far" because, instead of simply placing the goods in the custody of the court, it directed an application of the proceeds, which should only have been done upon final decree settling the rights of the parties.[2] Where the order appointing a receiver gives him "full power to collect the rents, take care of and preserve the same," he is authorized thereby to collect the rents to become due after the appointment as well as those due at the date of the appointment.[3] Evidence of the service of an order to show cause, although not recited in an order, appointing a receiver may be presumed to have been presented in support of such order.[4]

Orders appointing receivers have been made in the alternative, requiring a satisfaction of plaintiff's demand, or, in default, the appointment of a receiver.[5] It has been held by the circuit court of the United States for the southern district of Alabama, that one who has recovered judgment against the receivers of a railroad for injuries received while traveling as a passenger upon the road, is not entitled to payment out of the earnings of the road, or the proceeds of its sale, in preference to the first mortgage bondholders, unless it be so provided by the order of the court placing the road in possession of the receivers.[6]

Section 179. **The Order of Appointment May be Conditional.**— The court, in appointing a receiver to take charge of the affairs of an insolvent railroad company, may impose conditions, such as it deems just, respecting the payment of claims, and may require that the current earnings be applied in the first place to the payment of the running expenses.[7] It has been said that the court has no

[1] *Ex parte* Williams, 18 S. C. 299.
[2] West v. Chasten, 12 Fla. 315, 331.
[3] Cox v. Volkert, 86 Mo. 505.
[4] People v. Central City Bank, 53 Barb. 412; s. c. 35 How. Pr. 428.
[5] Cushing v. Townshend, 19 Ves. 628; McLane v. Placerville, etc., R. R. Co. 66 Cal. 606 (1885.)
[6] Davenport v. Receivers of the Alabama, etc., R. R. Co. 2 Woods, 519.
[7] United States Trust Co. v. New York, West Shore & Buffalo R. R. Co. 25 Fed. Rep. 800.

power to make it a condition to the granting of an order for the appointment of a receiver for a railroad that existing debts due laborers for services and to material-men for necessary supplies, for which they have liens, have preference in payment out of any funds which may come into the receiver's hands, derived from the income or from the sale of the *corpus* of the mortgaged property, and the order of appointment cannot contain a clause to that effect.[1]

Section 180. **The Appointment of Two or More Receivers, with Distinct Authority, is Not Advisable.**—In cases of very large property or estates situated at a distance from each other, it is not unusual to have more than one receiver, although, in the former instance, security might, perhaps, be equally obtained by the medium of additional sureties.[2]

In a case where two receivers had been appointed by agreement of the parties to the proceeding, one to represent the bondholders upon a certain part of the railroad, and the other to represent other interests, upon the theory that the different interests should be represented and protected by different receivers, which interests afterward become antagonistic, both receivers were removed by the court and a single one appointed in their stead. And it was said by Mr. Justice Miller, of the supreme court, sitting at circuit: "The existence of two receivers is unnecessary and embarrassing, even if they were on amicable terms and had but a single place of business at or near the theatre of the road's operations. They are obviously unnecessary as regards the successful operation of this road, which I assume to be the principal, if not the only, purpose for which a court should appoint receivers. If they should chance to disagree about the management of the road, or the exercise of any function of their office, as they have done in this case, the difficulty of the successful or proper discharge of their duties becomes manifest. When, in addition to this want of harmony, they establish separate places of business, a thousand miles apart and neither of them within two hundred miles of the road whose operations they are to control, it is apparent, without argument, that the hand of the court which they are, must be, if not paralyzed,

[1] Metropolitan Trust Co. v. Tonawanda, etc., R. R. Co. 103 N. Y. 245 (1886), reversing s. c. 40 Hun, 80, 90. See section 391.

[2] 1 Grant's Chan. Prac. 304; Stephen Gould v. David Banks, not reported, but the order of Chancellor Kent, appointing two receivers, may be found in Edwards on Receivers, 323 (n).

rendered very inefficient and uncertain in its grasp and control of the business of the company."[1]

Section 181. **When the Order Takes Effect — Relates Back.** — The order appointing a receiver relates back to the time of the decision directing such an order, so as to give the court control of the subject matter from that time.[2] But as against third persons, or interested parties not notified, it can not date or relate back beyond the order appointing him, and it is irregular and improper to insert such a clause in the order of appointment, as it would be unjust to vest the receiver with title at a period previous to his appointment.[3]

Section 182. **Vacating the Order.** — The Irish court of chancery has held that, although a receiver has been appointed in a foreclosure suit by an interlocutory order, and is in possession of the property in controversy, it is still within the power of the plaintiff to dismiss the bill at his costs.[4] The court may vacate an order appointing a receiver, pending a motion for a new trial of the case in which such appointment was made.[5]

The order appointing a receiver may be vacated on motion of the defendant, but not on the application of third parties.[6]

Section 183. **The Order Does Not of Itself Affect the Jurisdiction of Other Courts.** — In a case brought against a railroad company, and the receiver of its property, appointed by a United States circuit court, to recover taxes levied against the company, in which the defendants, appearing voluntarily and without formal leave of court, by answer alleged the appointment of the receiver and that he was not amenable to the process of the state court, and prayed for the dismissal of the suit as to him, it was said by Brewer, J., on appeal, holding that the court below properly had jurisdiction of the case: "It is evident that the question always is, not one of jurisdiction, but of contempt; that the ordinary jurisdiction of other courts is in no manner taken away or affected by the appointment of a receiver; that while the court making the appointment may

[1] Myer v. Kansas Pacific Ry. Co. 5 Dill. 476.

[2] Van Alstyne v. Cook, 25 N. Y. 489; Smith v. New York Consolidated Stage Co. 18 Abb. Pr. 409; Berry *in re*, 26 Barb. 55.

[3] Artisans' Bank v. Treadwell, 34 Barb. 523, 559, citing Wilson v. Allen, 6 Barb. 542; Rutter v. Tallis, 5 Sandf. Supr. Ct. 610; West v. Fraser, Id. 653; Gillet v. Fairchild, 4 Denio, 80. See sections 205, 207.

[4] White v. Lord Westmeath, Beatty (Ir. Chan.) 174.

[5] Copper Hill Mining Co. v. Spencer, 25 Cal. 11.

[6] Jacobson v. Landolt, 73 Wis. 142.

draw to itself all controversies to which the receiver is a party, it does so by acting directly upon the parties and not by challenging the jurisdiction of the other tribunals; that while it may so draw to itself, it is not compelled to do so, and that not doing so in a particular case, the mere fact of the appointment constitutes no plea to the jurisdiction."[1] Care must be taken not to confound the proposition here stated with questions closely allied with it arising in suits brought against a receiver without leave of the court which appointed him. They will be discussed in their order.

Section 184. **Miscellaneous Matter Relating to the Order—Its Sufficiency and Construction.**—Where the order appointing a receiver is *prima facie* regular and valid, it is a sufficient justification of the receiver's acts,[2] just as a sheriff is justified in executing process regular and valid on its face.[3]

It is elementary in the law of receivership that the receiver derives his power from the order appointing him. He is entitled to and should take possession of all the property included in the terms of the order.[4]

The order of appointment may be vacated on motion of a party, but not on application of a third party.[5]

An order read, to turn over "the books, notes and accounts of all kinds of the said defendant in the business of selling cigars, snuff, tobacco and other goods." It was objected that the order did not specify what notes, orders and accounts the defendant must turn over to the receiver, and it was impossible to comply therewith. Held that the order was sufficiently specific to put the defendant on notice of what books, notes and accounts he must turn over.[6] In another case the order read: "That James A. Melson, clerk of the superior court of Washington county, be appointed receiver." It was contended that the omission of the word "as" before the words "clerk of the superior court," rendered the appointment that

[1] St. Joseph & Denver City R. R. Co. v. Smith, 19 Kas. 225, 231. This decision follows Kinney v. Crocker, 18 Wis. 74, which, as it affects the right to sue a receiver without leave of court, was critically reviewed with an unfavorable result, in Thompson v. Scott, 4 Dill. 508. See more fully under leave to sue in the chapter on Suits By and Against Receivers, *infra*.

[2] Edee v. Strunk, 35 Neb. 307.

[3] The powers and liabilities of sheriffs and other officers in executing process fair on its face, are fully treated of in Alderson on Judicial Writs and Process, chapter 30.

[4] Quincy, Missouri & Pacific Railroad Co. v. Humphreys, 145 U. S. 82.

[5] Jacobson v. Landolt, 73 Wis. 142.

[6] Martin v. Burgwyn, 88 Ga. 78.

of Melson in his individual capacity only, when it should have been in his official capacity; but this was denied.[1]

It has been declared that an order appointing a receiver is of such notoriety that all persons have constructive notice thereof.[2]

An order read thus: "All and singular all town lots acquired by gift, purchase or otherwise, now owned or that may hereafter be owned by the said railway company," and "all other rights or property whatsoever;" held, "could only apply to property or rights then owned, and not to property thereafter to be acquired, and could not include the title afterward acquired to the lots."[3]

An order directing the receiver to replenish the stock and continue the business of the store, and dispose of the goods in due course of trade, authorizes the receiver to carry on the business and buy what in his judgment reasonably and prudently exercised, is essential to the execution of the terms and evident purpose of the order.[4]

"And it is further ordered that the said railway company, its officers and agents, and all persons who may have possession of any of the said railroad properties or appurtenances or rights and privileges thereof, deliver over to the said receiver all and every part of the properties, interests, effects, moneys, receipts and earnings, and all the books, vouchers and papers touching the operation of the said railroads or either of them; and all books of account and vouchers touching or relating to the moneys, finances and assets of the said defendant company, including the stock books and stock ledgers of the said defendant company." Such order was held to be clear and include books of former companies, and bills payable in New York, and cash book; that the order did not mean only books touching the future operation of the railroad; that the phrase "all books of account," etc., was not limited to only such books as the receiver might "happen to demand or be able to guess that existed."[5]

Section 185. **Collateral Attack of the Order.** — It is elementary that when a court has jurisdiction of the parties and the subject-matter of an action its orders and decrees in the suit are final and conclusive in all collateral proceedings. In determining whether an

[1] Waters v. Melson, 112 N. C. 89.

[2] Memphis & Charleston Railroad Co. v. Holchner, 14 U. S. C. C. App. 469.

[3] Gabert v. Olcott, 22 S. W. R. 286.

[4] Eskridge v. Rushworth, 8 Colo. App. 562.

[5] American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co. 52 Fed. R. 937.

order appointing a receiver is open to collateral attack the primary consideration concerns the jurisdiction of the court to make the order. If the jurisdiction existed the order is beyond collateral attack, though it be irregular and voidable,[1] in the sense that it might be successfully assailed directly by motion of the defendant. But if the court was without jurisdiction to make the appointment, the order may be attacked at any time, in all forms and by all persons.[2]

The appointment cannot be questioned in an action instituted by the receiver,[3] in an intervening,[4] a *habeas corpus*,[5] or in a supplemental proceeding,[6] nor by the parties thereto,[7] nor in a proceeding by a judgment-creditor.[8]

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[1] For a full discussion of the terms "void" and "voidable" and of collateral attack see Alderson's Judicial Writs and Process, chapter 4.

[2] The propositions asserted in the text are supported by the following authorities: Commercial National Bank v. Burch, 141 Ill. 519; Elderkin v. Peterson, 8 Wash. 674; Great Western Telegraph Co. v. Gray, 122 Ill. 630; Greenawalt v. Wilson, 52 Kans. 109; Lowenstein v. Finney, 54 Ark. 124; Neeves v. Boos, 86 Wis. 313; Edrington v. Pridham, 65 Tex. 612; Dean v. Thatcher, 32 N. J. L. 470; Wood v. Blythe, 46 Wis. 650; Keokuk Northern Line, etc. Co. v. Davidson, 18 Mo. App. 561; Mercantile Trust Co. v. Pittsburg, etc. R. R. Co. 29 Fed. R. 732; Lutt v. Grimont, 17 Bradw. 308, 313; Texas and Pacific Railway Co. v. Gay, 86 Tex. 571; Bradley v. Marine and River Phosphate and Mining Co. 3 Hughes, 26; Comer v. Bray, 83 Ala. 216; Capital City Mutual Fire Insurance Co. v. Boggs, 33 At. R, 349; Compton v. Jesup (U. S. C. C. A.). 68 Fed. R. 263; Wiedemann v. Sann, 31 At. R. 211; Whitney v. Hanover National Bank, 15 So. R. 33; Davis v. Shearer (Wis.), 62 N. W. R. 1050; Block v. Estes, 92 Mo. 318; Bodkin v. Merit, 102 Ind. 293.

[3] Neeves v. Boos, 86 Wis. 313; Jones v. Blun, 145 N. Y. 333.

[4] Quincy, Missouri and Pacific Railway Co. v. Humphreys, 145 U. S. 105; Florence Gas, Electric Light and Power Co. v. Hanley, 13 So. R. 343.

[5] Lewis, *in re*. 52 Kans. 660.

[6] Thomas v. Gartner, 97 Mich. 608.

[7] Smith v. Harris (Ind.), 35 N. E. R. 984.

[8] Jones v. Blun, 145 N. Y. 333.

CHAPTER VIII.

OF THE RECEIVER'S BOND—LIABILITY OF THE SURETIES.

Section 186. The Receiver Must Generally Give a Bond.
187. When a Bond Need Not be Given.
188. The Receiver's Own Recognizance.
189. The Bond Upon an Extension of the Receivership and Continuance of Temporary as Permanent Receiver.
190. Number of Sureties—Assignment of Securities.
191. Who May be Sureties.
192. Bond Made Payable to an Officer of the Court.
193. The Bond Must be Approved by the Court—Consent.
194. When the Security Becomes Insufficient—Vacating the Bond as to One Surety.
195. Effect of Failure to Give Bond and of Imperfections in the Bond.
196. The Same Subject Continued.
197. The Nature of the Sureties' Liability—Their Discharge—Effect of New Bond on Sureties.
198. Effect of Discontinuance of the Suit—Death of a Surety.
199. Sureties Liable Upon a General Clause in the Condition of a Bond.
200. Breach of Bond—Liability Absolute—Proof Required to Enforce the Bond.
201. Requisite Proof Continued.
202. Surety Liable for Interest, Costs, Etc.
203. Vacating a Recognizance—Payment to a Solicitor.
204. Reimbursement of the Surety—How Far He is Considered an Officer of the Court.

Section 186. **The Receiver Must Generally Give a Bond—Presumption.**—The relation of the receiver to the court as its executive officer for the preservation of the property in controversy, and as the actual holder of it on behalf of the court, although for the benefit of those to whom the court shall finally award it, renders it necessary that every precaution shall be taken to secure the parties interested, in every reasonable way, against loss or damage from his illegal act or negligence. The necessity is the greater from the fact that such parties have no recourse to the court itself for such illegal acts or negligence, even though the holding of the receiver be technically its holding. In consequence the receiver is required, before entering upon the discharge of his duties, and particularly before taking possession of the property, to give a bond, or enter into a recognizance for the due and faithful performance of

his duty.[1] The receiver's title and possession and his right to perform the duties and exercise the power of his office are dependent and accrue only upon his giving the required bond as fixed by the order of his appointment.[2]

Where the order of appointment provides for bond, in an action by the receiver, it will be presumed that he gave bond.[3]

Section 187. **When a Bond Need Not be Given.**—Although it is a general rule that the receiver must give a bond, and that his own recognizance is not sufficient, there may be cases where it is within the discretion of the chancellor to dispense altogether with the security of a bond. Thus, in New York, where, in proceedings by judgment creditors against their debtor, the same person is appointed receiver in different actions brought by different creditors, it has been held that he need not give new security in each action successively, if the security in the original action were approved by the court as adequate.[4] So, also, a mortgagee of an estate in the West Indies was, in an old case, appointed receiver in England without being required to give security.[5] In South Carolina it is the usual and better practice to require bonds from receivers appointed in supplementary proceedings, but it is not essential.[6]

As a general rule of law the obligation of a receiver to give security for the due performance of his trust is to be regarded as founded upon the general practice of the court of chancery and, therefore, within the power of the chancellor to be altogether dispensed with in a proper case.

Where a receiver was appointed to act without compensation the court dispensed with giving bond.[7]

It is usual for the order of appointment to provide that the receiver give bond, and unless such requirement is waived by the court, or the parties in interest, the receiver must comply with the order before taking possession of the property.[8]

Section 188. **The Receiver's Own Recognizance.**—It has sometimes been held that when a person is appointed receiver upon the

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[1] Tomlinson v. Ward, 2 Conn. 396; Matter of Eagle Iron Works, 8 Paige, 385.

[2] Woods v. Ellis, 85 Va. 471; Johnson v. Martin, 1 T. & C. (New York Sup. Ct.) 504; Defries v. Creed, 34 L. J. (N. S.) Eq. 607; Edwards v. Edwards, 2 Ch. D. 291; reversing s. c. 1 Ch. D. 454; *Ex parte* Evans, 13 Ch. D. 252.

[3] Hegewisch v. Silver, 140 N. Y. 414.

[4] Banks v. Potter, 21 How. Prac. 469.

[5] Davis v. Barrett, 13 L. J. (N. S.) Chan. 304.

[6] Dilling v. Foster, 21 S. C. 335, 339.

[7] Gardner v. Blane, 1 Hare 381.

[8] Hegewisch v. Silver, 140 N. Y. 414.

nomination of either party to the litigation, his own recognizance may be taken in lieu of other security.[1] So, also, where the receiver is responsible and satisfactory to all parties except the defendant, he may be allowed to give security by his individual recognizance.[2]

The rule, however, is otherwise in the Irish court of chancery, and it is there held that a receiver will not be appointed without giving security other than his own recognizance, even though he has been appointed by consent of all the parties in interest.[3]

There is precedent for permitting a receiver to act on his own recognizance.[4]

Section 189. **The Bond Upon an Extension of the Receivership and Continuing Temporary as Permanent Receiver.** — Where the receivership is extended so that the receiver may take possession of other assets of the debtor, additional security in proportion to the additional property should be given.[5] It is general chancery practice that, where application is made for the appointment of a receiver over an estate already in the hands of another receiver, to extend the appointment of such other receiver to such applications, and on being so extended, additional security may be required; or, in default thereof, another appointment may be made.[6]

If a receiver be extended over new or additional property in any case, it is usual to require that the bond of such receiver be increased in double the amount of the value of such additional property, and if the receiver neglect or be unable to procure such further security, upon due notice to him so to do, it is the practice to apply that he be discharged, and that a new receiver be appointed over the entire property.[7]

The continuance of the temporary receiver as permanent receiver, without requiring new bond, also continues the original bond. In such a case the court has, of course, power to require a new bond, but the receiver is not required to give additional bond unless ordered by the court to do so.[8]

Section 190. **Number of Sureties — Assignment of Securities.** — A receiver is usually required to furnish two sureties; there ought

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[1] Mauners v. Furze, 11 Beav. 30.

[2] Ridout v. Earl of Plymouth, Dick. 68; Mauners v. Furze, 11 Beav. 30.

[3] Carlisle v. Berkley, Amb. 599.

[4] Bailie v. Bailie, 1 Ir. Eq. 413.

[5] Downshire v. Tyrrell, Hayes 354. of such security be not given the receiver may be removed. Wise v. Ashe, 1 Ir. Eq. 210. See also the same case as to his fees.

[6] Ibid.

[7] Smith on Receivers, 192; Edwards on Receivers, 109,

[8] Janes v. Blun, 145 N. Y. 333; s. c. 39 N. E. R. 954.

to be at least two.[1] Under the earlier practice of the English court of chancery, it seems that the number was almost universally two;[2] but the number may vary in the discretion of the court, which has in view only the security of the fund. Under proper circumstances one surety has been allowed instead of two or more.[3] In modern practice it is of frequent occurrence that a greater number is required.

While it is not the ordinary or proper course to take security for the faithful performance of duty by a receiver, in any other way than by a bond, it was held, in England, in a case where three executors assigned a mortgage belonging to their testator's estate as security for the receivership of one of their number, in a matter not connected with their trust, that the assignment was valid, and that the mortgage should be held for the sum due from the receiver.[4]

Section 191. **Who May be Sureties.** — It is required that the sureties upon a receiver's bond be real and substantial persons.[5] If the matter of sureties in case of a receiver be put on the same footing as special bail, then they ought to be free-holders or housekeepers. This seems to be the general rule in England.[6]

But in this country it would not, it is believed, be universally insisted upon. A court would look to the accountability or responsibility of one offered as surety, rather than make inquiry whether or not he was a free-holder or house-keeper. It is not necessary that the sureties be citizens of the state in which the action is pending and the court may lawfully accept non-resident sureties.[7]

It is the rule in England that the sureties of a receiver must be within the jurisdiction.[8] As of course, no persons disabled by law from making a contract, as infants, lunatics, idiots and married women, are eligible at common law as sureties.[9]

By the practice of the Irish court of chancery, the receiver must be possessed of real estate, but this is not the rule here. It is the right of the court to accept or reject any person proposed as a

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[1] Mead v. Orery, 3 Atk. 235; Johnson v. Martin, 1 T. & C. (N. Y. Sup. Ct.) 504.

[2] Mead v. Orery, *supra*.

[3] Johnson v. Martin, 1 T. & C. (N. Y. Sup. Ct.) 504, citing the case of the Mechanics' Fire Insurance Co. 5 Abb. Pr. 444, 446.

[4] Mead v. Orery, 3 Atk. 235.

[5] Smith v. Scandrett, W. Black. 444; Beardmore v. Phillips, 4 Maule & Sel. 173.

[6] Lofft, 148.

[7] Taylor v. The Life Association of America, 3 Fed. Rep. 465.

[8] Cockburn v. Raphael, 2 Sim. & S. 453.

[9] Smith on Receivers, 16.

surety arbitrarily, and when there is any doubt as to the sufficiency or solvency of the security offered, it is the duty of the court to hear the opposing parties in relation thereto. This is generally done upon notice. If the sureties, or either of them, are finally rejected, a new surety or sureties, as the case may be, must be procured.[1]

It was formerly the practice in New York to allow a plaintiff, or petitioning creditor, to be one of the sureties for the receiver. But although there may be no positive legal objection to such a practice, yet, inasmuch as the receiver is the officer of the court and not the agent or representative of either party to the action, it is not to be commended.

Section 192. **Bond Made Payable to an Officer of Court — Construction of.**— Where the penal sum in a receiver's bond was payable to "J. M. S., clerk of the superior court, etc.," without any words showing that the obligee's representatives were to succeed to his rights, and which showed on its face that it was given in pursuance of orders of the court, to secure the faithful performance of the receiver's duty, etc., in an action on said bond it was construed not to be an obligation to J. M. S. individually, but was held valid for the purpose for which it was given, the recitals in the bond being considered *prima facie* evidence of the facts therein set forth, and the action was held to be properly brought by the party interested, in his own name, after leave of court duly obtained under section 814 of the New York code of civil procedure.[2]

If the clerk of a court, already under bond as clerk, is appointed a receiver, the sureties upon his bond as clerk, are presumed to have entered into the bond with reference solely to his duties in that office, and cannot be held liable for his negligence or default as receiver.[3]

Section 193. **The Bond Must be Approved by the Court — Consent.**— It is usual to provide in the order of appointment not only for the giving of the bond and the appointment of the sureties, but also that the sureties upon the bond shall be approved by the court, or, sometimes, by the clerk. In Indiana, however, it is

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[1] Smith on Receivers, 17; Edwards on Receivers, 94.

[2] Titus v. Fairchild; 49 New York Super. Ct. 211, 219, 220.

[3] Kerr v. Brandon, 84 N. C. 128; Rogers v. Odom, 86 N. C. 432; Syme v. Bunting, 91 N. C. 48. In the case last cited the effect of a statute enlarging the clerk's liability in such cases, and the liability of sureties upon his official bond given after the passage of the statute, are considered.

held, where the statute under which a receiver acts authorizes both the appointment and the approval of the bond by the court that both acts are to be performed by the court itself, and that the bond cannot lawfully be approved by the clerk.[1]

In the earlier practice both in England and in this country, there was a reference to a master to determine the form of the bond, and to approve of the sureties, but this is no longer the usual procedure. The amount and condition of the bond is usually stipulated in the order of the appointment. It is to be determined by the court or officer making the appointment, due regard being had to the value of the property entrusted to the receiver and the magnitude of the trust devolving upon him. Accordingly it is held in California that a court commissioner has no jurisdiction to appoint a receiver, and that a bond given by a receiver so appointed is void.[2] It is in general not competent for the parties themselves to dispense with the security of a bond even by consent.[3] It has, however, been held, where the parties have agreed upon a receiver and then ask the court that he be appointed without security, that such a proceeding is regular.[4]

In New York, a bond, given in pursuance of an order or decree, by a receiver to the clerk of the court, conditioned for the faithful performance of the receiver's duty, does not fall within the prohibition of the statute forbidding a sheriff or other officer to take any bond, obligation or security by color of his office, except such as are provided by law.[5]

Section 194. **When the Security Becomes Insufficient—Vacating the Bond as to One Surety.**—Where the security of a receiver appeared insufficient, and the court made a rule upon him to show cause why he should not give other securities, it was held, upon his failure to show cause, that the court might remove him and appoint another receiver in his place, and direct him to deliver up to his successor the amount collected, together with all the partnership assets in his hands; also that, for failure to pay over such funds, suit might be brought against him and the sureties on his bond as receiver.[6]

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[1] Newman v. Hammond, 46 Ind. 119.

[2] Quiggle v. Trumbo, 56 Cal. 626.

[3] Manners v. Furze, 11 Beav. 80; *Cf.* Tylee v. Tylee, 17 Beav. 583.

[4] Manners v. Furze, 11 Beav. 80.

[5] Titus v. Fairchild, 49 N. Y. Super. Ct. 211, 218.

[6] Schackelford's Admr. v. Shackelford, 32 Gratt. 481, 510, 514. In this case the court made an alternative order that, unless the first receiver paid over the funds in his hands to his successor within sixty days, a suit should be instituted against him and his sure-

In an Irish case it has been held competent for the parties to a cause to consent that the receiver's bond be vacated as to one surety, and that he be absolutely discharged, without releasing the remaining surety in the case. Inasmuch as such a proceeding was not in accord with the usual rule of a court of chancery with respect to the release of sureties, the continuing surety and the receiver entered into a written agreement which provided that the bond should continue to be binding upon them, although it had been vacated as to the retiring surety. This agreement was verified by an affidavit stating that the parties consented to the vacating of the recognizance as to the one surety, without prejudice to the liability of the receiver and of the other surety, as well for acts done before as for those done after the release; and it was stipulated not to rely on such discharge in defense of any future action or proceeding which might be brought against them.[1]

Section 195. **Effect of Failure to Give Bond and of Imperfections in the Bond.**—In England, it has been held, that where there is a levy upon the property over which the receiver is appointed between the date of the appointment and the time of executing the bond, such levy will not interfere with the receiver's possession.[2] If, between the date of the appointment and the time of giving the required security, an attorney in the cause receives the rents or proceeds of the sale of a piece of property which is the subject matter of the receivership, he must, after the bond is given, pay the money to the receiver.[3] So, also, where upon his appointment a receiver gave bond with two sureties, and one afterwards caused himself to be discharged, and the receiver procured a new bond to be executed, but the time for offering it for approval had elapsed, it was held that it might be entered *nunc pro tunc*.[4] When the bond given by a receiver, upon his appointment, in a suit for an account and settlement of co-partnership concerns, is not filed in the proper office, through inadvertence, the court may direct it to be filed *nunc pro tunc*.[5]

It was formerly held in New York that a failure to execute the

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ties therefor, by a commissioner named in the order, who was required to give bonds for the faithful performance of his duties.

[1] Callaghan v. Callaghan, 8 Ir. Eq. 572. See also O'Keeffe v. Armstrong, 2 Ir. Chan. (N. S.) 115.

[2] Defries v. Creed, 34 L. J. (N. S.) Eq. 607; Edwards v. Edwards, 2 Ch. D. 291, reversing s. c. 1 Ch. D. 454. See also *Ex parte* Evans, 13 Ch. D. 252.

[3] Wickens v. Townshend, 1 Russ. & M. 361; *In re* Birt, 22 Ch. D. 604.

[4] Vaughan v. Vaughan, Dick. 90.

[5] Whiteside v. Prendergast, 2 Barb. Chan. 471.

bond in due form, was sufficient to authorize a nonsuit in an action brought by a receiver;[1] but, in a later case, the court took the position that it is not competent for the defendants, in an action brought by a receiver, to set up a mere informality in the bond, as that it was not executed under seal, in bar of the action, such an irregularity being one of which the judgment debtor only can take advantage.[2]

If the receiver is not ordered to give bond, that none has been given is no defence to an action instituted by him.[3]

Section 196. **The Same Subject Continued.** — It has been held in Texas that where, by a final decree, a receiver has been appointed to execute it, the failure to require a bond of him is no ground for reversing the decree, such omission being looked upon as the fault of the defendant in not requiring a bond.[4] In Louisiana the court has authority to appoint receivers of the property of a corporation, on petition of creditors with the consent of the stockholders, in whom was vested the right of appointing commissioners of liquidation; and where one of the receivers so appointed absents himself and fails to file the bond required under order of the court, it lies within the discretion of the court to remove him and appoint another in his stead.[5]

Where one of the sureties of a receiver dies, not leaving any property, the court will direct a new surety to be appointed.[6]

Section 197. **The Nature of the Sureties' Liability — Their Discharge — Effect of New Bond on Sureties.** — The liability of the sureties of a receiver, like the liability of sureties in general, is *strictissimi juris;* such sureties are universally to be held very strictly to the obligation of their bonds, and, unless it appear to be clearly for the benefit of the estate or of the parties to the cause, they are not to be discharged upon their own application.[7]

The liability of the sureties on a receiver's bond grows out of

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[1] Johnson v. Martin, 1 T. & C. (New York Sup. Ct.) 504.

[2] Morgan v. Potter, 17 Hun, 408. In this case the court cited Tyler v. Willis, 33 Barb. 327, and Underwood v. Sutcliffe, 10 Hun, 453, and distinguished Johnson v. Martin, *supra*, as not being necessarily in conflict with the other cases cited, because, for aught that appears in that case, the objection was taken by the judgment debtor and it did not appear that the receiver had obtained an order of the court giving him leave to sue, as had been done in the case under consideration.

[3] Wilson v. Welsh, 151 Mass. 77.

[4] Shulte v. Hoffman, 18 Texas, 678.

[5] *In re* Louisiana Savings Bank, etc., 35 La. Ann. 196, 201.

[6] Averall v. Wade, Flan. & K. (Ir.) 341.

[7] Griffith v. Griffith, 2 Ves. 400.

their undertaking as sureties, and can be ascertained and enforced only by a suit on the bond in a common law court, where full opportunity for making defence, and the constitutional right of trial by jury can be had. The equity court has no jurisdiction to try their liability, by a rule to show cause in the original suit, to which they are in no just sense parties.[1]

In Mississippi a statute authorizing the court to allow proceedings by *scire facias* against sureties on a receiver's bond, has been adjudged constitutional and a proper exercise of the legislative authority.[2]

The request of a surety to be discharged from further obligation on the bond will not be granted except for special cause shown.[3]

When, under order of court, the receiver gives a new bond, the sureties on the first one are in no regard released, but are liable for any default of the receiver occuring after as well as before the new bond takes effect; unless the court releases the first sureties. The new bond becomes and is merely additional and cumulative, rather than substitutional.[4]

Section 198. **Effects of Discontinuance of the Suit — Death of a Surety.**— The discontinuauce of a suit in equity for an account and settlement of the concerns of a copartnership, does not discharge a receiver appointed therein; but it will entitle the receiver to apply for his disharge, and exonerate both him and his sureties, unless the interests of the defendants require that he should continue in the receivership, in which case the defendants so protected should be required to file a bill forthwith, to settle their rights.[5]

Where, in a suit in chancery to settle partnership accounts, the court appoints a receiver, who gives bond and takes charge of the property, a compromise and dismissal of the suit does not discharge the receiver from accountability to the court, but he is not liable to an action on his bond, until he have failed to obey some order of the court in relation to the effects placed in his hands.[6]

If one of the sureties upon a receiver's bond die, leaving no property available to meet his obligation upon the bond, the receiver will be required to obtain a new surety in his stead.[7]

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[1] Thurman v. Morgan, 79 Va. 367, 372.

[2] Bank v. Duncan, 52 Miss. 740.

[3] Stewart v. Johnson (Ga.), 13 S. E. R. 258.

[4] Id.

[5] Whiteside v. Prendergast, 2 Barb. Chan. 471.

[6] State v. Gibson, 21 Ark. 140.

[7] Averall v. Wade, Flan. & K. (Ir.) 341.

Section 199. **Sureties Liable Upon a General Clause in the Condition of a Bond.**— Where the condition of the bond was that certain creditors named should be paid, and also that the receiver should well and truly account for all moneys received by him, pay over all such moneys and comply with all orders of the court concerning the same, it was held that, although the creditors named in the condition had been fully paid, other creditors, not named, might recover against the sureties upon the bond for a breach of the condition to account, pay over and comply with orders, etc.[1]

Section 200. **Breach of Bond — Liability Absolute — Proof Required to Enforce the Bond.**— If a bond, or recognizance, is conditioned that it shall be void if the receiver duly perform his duty and account to the court, the bond becomes absolute immediately upon his failure in either respect.[2] But, according to some rulings, there can be no action brought to enforce the bond until the receiver has failed to obey an order of the court touching the property under his control. So the practice in many cases is to apply to the court for a rule upon the receiver to account, and a failure to account, or to comply with an order to pay over money after an accounting, will render the receiver and his sureties liable on the bond.[3]

In Massachusetts it has been decided that the omission of a receiver to pay to himself, as receiver, money borrowed by him of the defendant company before he was appointed, was a breach of his bond for which he and his sureties were liable.[4] But taking property under order of the court to which the receiver has no right is not a breach of the bond.[5]

Where a bond is conditioned that the receiver shall faithfully execute his trust and make payments as directed by order of the court, it is sufficient to sustain an action for breach thereof against the sureties, to prove orders granted after a hearing upon notice to the receiver, directing him to pay a certain sum to plaintiff, and adjudging him in contempt for failure to do so; in such case plaintiff need not prove that there are funds of the estate in the receiver's hands sufficient to meet his claim.[6]

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[1] Ross v. Williams, 11 Heisk. (Tenn.) 410.

[2] Maunsell v. Egan, 3 Jones & Lat. (Ir.) 251.

[3] Bank of Washington v. Creditors, 86 N. C. 323; Atkinson v. Smith, 89 N. C. 72; State v. Gibson, 21 Ark. 140.

[4] Commonwealth v. Gould, 118 Mass. 300.

[5] People For Use v. Murdoch, 50 Ill. 311.

[6] Titus v. Fairchild, 49 New York Super. Ct. 211, 221.

A right of action on the bond does not and cannot accrue until there has been an accounting and order of the court thereon; that is until there has been a settlement.[1]

Section 201. **Requisite Proof Continued.**— A surety of a receiver is concluded, in a suit at law on the bond, by the amount found due in an account taken in chancery, he having had, by due notice, an opportunity to intervene in the taking of such account.[2] An order fixing the amount due from a receiver, and directing him to pay it, is competent as evidence in an action against the sureties on his bond, both as to the breach of the condition for the faithful performance of his duties and as to the amount due from him on account of his receivership.[3] In such case the fact that the receiver has rendered certain services, for which the amount of his compensation has not been determined or paid to him, will not avail to reduce the liability of the sureties.[4] If the condition of the bond recites that the receiver will "henceforth faithfully discharge the duties of his trust," the surety cannot, in an action on the bond, be held liable for any default or failure to perform his duty, which occurred before the execution of the bond, and, in such a case, it was held in New York that the surety was not concluded by an accounting and an order thereon fixing the sum due from the receiver, when the surety was not made a party to the accounting and had no opportunity to be heard.[5]

The fact that a receiver is not authorized to take notes in payment for the hire of property, which he has a right to hire by authority of the court, will not relieve either him or his sureties, in an action upon the bond, from liability for the proceeds of notes actually taken and collected on account of such hiring.[6] Upon the petition of interested parties leave will be given to bring suit against the sureties of a receiver, who has died leaving a balance due the estate, even though the amount of such balance is not determined.[7]

Section 202. **Surety Liable for Interest, Costs, etc.**— Sureties are usually held liable for interest upon sums due from a receiver in

[1] French v. Dauchy, 134 N. Y. 548; s. c. 10 N. Y. S. 468.

[2] Ball v. Chancellor, 47 N. J. Law, 125, 134, 136.

[3] Commonwealth v. Gould, 118 Mass. 300.

[4] Ibid.

[5] Thomson v. McGregor, 91 N. Y. 592.

[6] Weems v. Lathrop, 42 Texas, 207. This case also relates to the right of a second receiver to bring an action against the sureties upon the bond of his predecessor in the office, by reason of whose death he was appointed.

[7] Ludgater v. Channell, 3 Mac. & G. 175, reversing s. c. 15 Sim. 479.

default, as well as for the principal,[1] but their liability in this respect is regarded as discretionary by the court.[2] So, in a case where the receiver was notoriously bankrupt, of which fact the parties interested in the estate had knowledge for a considerable time, and had taken no steps to obtain an accounting, the court excused the sureties on his bond from paying interest upon the amount for which he was in default.[3] In case it is necessary to attach the receiver, in proceedings in contempt, for not accounting, and to institute proceedings for his removal, the sureties upon his official bond will be called upon to pay the costs of such attachment and removal proceedings, to the extent of their obligation, and also the costs attending the appointment of a successor.[4] After sureties have fully paid the balance due by the receiver, they may protect themselves from the danger of having a judgment enforced upon his recognizance, by obtaining an injunction.[5]

Section 203. **Vacating a Recognizance—Payment to a Solicitor.**— A bill to have a recognizance vacated will be dismissed unless fraud be shown, and it be made to appear that the person secured by the bond is connected with such fraud, or unless it very certainly appear equitable and just that the surety be relieved.[6] Where a receiver who was indebted to the estate was discharged under the Insolvent Debtor's Act in England, and the surety upon his bond paid the amount of the indebtedness to the solicitor who was conducting the proceeding against him to enforce payment, the court refused to discharge the proceedings until the plaintiff had been duly served with notice of the motion to discharge, on the ground that the payment to the solicitor was not sufficient. Upon the giving of the notice, and the failure of the plaintiff to appear in opposition to the motion, the discharge was ordered.[7]

Section 204. **Reimbursement of the Surety — How far he is Considered an Officer of the Court.**— That a surety who has been compelled to pay money on account of his obligation upon a receiver's bond is entitled to be reimbursed out of the balance in the receiver's hands was decided by Lord Eldon, who said: "As the receiver is an officer of the court, and the surety is so in a sense, if there is anything due in account between them, justice requires

[1] Dawson v. Raynes, 2 Russ. 466.

[2] *In re* Herrick's Minors, 3 Ir. Ch. (N. S.) 188.

[3] Dawson v. Raynes, *supra*.

[4] Maunsell v. Egan, 8 Ir. Eq. 372, affirmed, s. c. 9 Id. 283; s. c. 3 Jones & Lat. (Ir.) 215.

[5] *In re* Herrick's Minors, *supra*.

[6] Hamilton v. Brewster, 2 Mol. 407.

[7] Mann v. Stennett, 8 Beav. 189.

that, upon the application of the surety, he shall be indemnified for what he has paid for the receiver out of the balance due him."[1] His lordship, in the same case, granted a motion made by the surety of a receiver who had been discharged by the court, to restrain him from appropriating a balance due him, until he should pay to the surety money advanced on his account.

And where a surety, by way of protecting himself upon his obligation, obtains from the receiver part of the funds belonging to the estate in his keeping, knowing them to be such, the court may make an order directly against him, in the same suit, requiring him to return them into court. This order was, in one case, based upon the theory that the surety was within the jurisdiction of the court for the purpose, on account of his relation to the fund as surety and because he had thereby been enabled to tamper with it.[2]

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[1] Glossup v. Harrison, 3 Ves. & Bea. 134.

[2] Seidenbach v. Denkenspiel, 11 Lea. (Tenn.) 297

CHAPTER IX.

OF THE EFFECT OF THE APPOINTMENT — OF THE RECEIVER'S TITLE AND POSSESSION — OF INTERFERENCE THEREWITH — CONTEMPT PROCEEDINGS.

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II.

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242. Garnishment — Receiver not Subject to — Exception.
243. The Rule Herein in Colorado, Maryland and Elsewhere.
244. The Court will Aid its Receiver in Obtaining Possession of Property Subject to the Receivership.
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III.

Of Interference with the Receiver — Contempt of Court.

250. Interference with a Receiver is Contempt of Court.
251. What will Amount to an Interference.
252. Contempt on the Part of the Defendant.
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256. What Constitutes Sufficient Notice of the Appointment of the Receiver Herein.
257. The Rule Where the Appointment is Irregular or Erroneous.
258. The Title to the Property Cannot be Adjudicated in Contempt Proceedings.
259. Contempt on the Part of the Receiver — Conflict of Receiverships.

Section 205. **Generally of the Effect of the Appointment as to Corporations and Individuals — Illustrations — Taxes.** — When property has been attached under a writ issued by a state court, the receiver of the federal court, appointed subsequently, takes the

property subject to the attachment lien.[1] The functions of a corporation are suspended by the appointment of a receiver of its property and affairs,[2] but the appointment does not effect the dissolution of the corporation.[3] While the receivership exists it cannot sue,[4] but a suit againt it may be prosecuted to judgment.[5] But the judgment will not have priority over other claims.[6]

The appointment of a receiver does not divest the property of prior existing liens,[7] but affects them only in the manner and time of their enforcement. While the property is in the possession of the receiver the right to enforce the lien is suspended; because the property is in the custody and control of the court.[8]

In a foreclusure proceeding the appointment of a receiver is equivalent to the sequestration of the rents and profits accruing after the date of the order, and as to all which have previously accrued and remain unpaid.[9] The appointment of a receiver determines no right as between the parties, nor does the mere appointment of a temporary receiver affect the title to the property in any way.[10]

It has been said that, "if there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution of the fund out of which creditors are to be paid."[11] The effect of appointing a receiver is to place the property *in custodia legis*. The appointment gives the court the power to control all controversies which affect the property.[12]

Where one had agreed to make certain loans through a mortgage and investment company and had paid the money to the company and the papers had been executed and delivered to the company and the money paid out by it to the borrower, but before the delivery

[1] Cole v. Oil-Well Supply Co. 57 Fed. R. 534.

[2] Combs v. Smith, 78 Mo. 32.

[3] Del Valle v. Navarro, 31 Abb. N. C. 136; City Water Co. v. State (Tex.) 32 S.W. R. 1033; State *ex rel.* Independent District Telegraph Co. v. Second Judicial District Court, 39 Pac. R. 316; Hasselman v. Japanese Development Co. 27 N. E. R. 318.

[4] Davis v. Ladoga Creamery Co. 128 Ind. 223.

[5] Hasselman v. Japanese Development Co. 27 N. E. R. 318.

[6] Clinkscales v. Pendleton Manufacturing Co. 9 S. C. 314.

[7] Dann Manufacturing Co. v. Parkhurst, 125 Ind. 317; Hoffmann v. Schoyer, 143 Ill. 598; Kneeland v. American Loan and Trust Co. 136 U. S. 89; Arnold v. Weimer, 58 N. W. R. (Neb.) 709; Cherry v. Western Washington Industrial Exposition Co. 40 Pac. R. 136.

[8] Dann Manufacturing Co. v. Parkhurst, 125 Ind. 317; State *ex rel.* v. Superior Court, 7 Wash. 77.

[9] Gaynor v. Blewett, 82 Wis. 313.

[10] Harman v. McMullin, 85 Va. 187. Howell v. Hough, 46 Kans. 152.

[11] Havemeyer v. Supreme Court, 84 Cal. 1327; Howell v. Hough, 46 Kans. 152.

[12] Howell v. Hough, 46 Kans. 152.

of the papers to the party making the loan a receiver was appointed of the mortgage and loan company, held that the party making the loan, in an equitable action, would be decreed the possession and title of the papers, the court saying that such party "has a special property in the securities in controversy which the appointment of the receiver did not divest, and which a court of equity will protect. No adverse rights have been acquired by third parties and we are of the opinion that the appellant is entitled to the relief which he demands."[1]

The appointment of a receiver, with nothing more, places the property *in gremio legis* and removes it from the reach of all persons who have any notice of the order.[2] Possession is not necessary to consummate the exclusive right of the appointing court to control the property.[3]

The appointment of a receiver of an estate in the possession of executors divests them of the right to hold the property or in any manner to prevent the receiver from taking possession of it.[4]

The effect of the appointment of a receiver ends leases and other contracts of the defendant.[5] The statutory right of a creditor of a corporation to sue the directors to enforce a liability of the company is not suspended by the appointment of a receiver of the corporation.[6] It is said that ordinarily, when a sheriff has seized property under a writ, and afterwards, but before the sale a receiver is appointed of the property, the sale is not void, but at most only irregular.[7]

After the appointment of a receiver the right of a creditor to sequestrate the debtor's property by attachment is suspended,[8] but the appointment does not dissolve valid attachments levied before the commencement of the proceeding in which the appointment was made.[9]

"The appointment of a receiver of an insolvent corporation on the bill of an unsecured creditor does not avoid its contracts with the secured creditors, or deprive them or their trustees of the right to possess, control and enforce their securities." [10]

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[1] Kimball v. Gafford, 87 Ia. 65.

[2] Regenstein v. Pearlstein, 30 S. C. 192. In this case it is said that the mere appointment places the property *in custodia legis*.

[3] Regenstein v. Pearlstein, 30 S. C. 192.

[4] Clapp v. Clapp, 49 Hun, 195.

[5] Fidelity Safe Deposit & Trust Co. v. Armstrong, 35 Fed. R. 567.

[6] Patterson v. Stewart, 41 Minn. 84.

[7] Varnum v. Hart, 119 N. Y. 101.

[8] Baring v. Galpin, 18 At. R. 266.

[9] Page v. Supreme Lodge, Knights and Ladies of Protection (Mass.), 37 N. E. R. 369; Graham v. Mutual Aid Society, Id. 447.

[10] Risk v. Kansas Trust & Banking Co. 58 Fed. R. 45.

The receiver takes the assets of the defendant incumbered with all valid liens thereon which attached before his appointment.[1]

The City of New Orleans being the mere compulsory trustee of a trench fund, without any obligation of debtor and creditor as between it and the fund, and a reciver of the fund having been appointed, held that the city was no longer subject to suit in regard to the fund, but the same should be brought against the receiver.[2]

After the appointment of a receiver of a corporation he alone has the right to sue to set aside a fraudulent mortgage. The creditors of the corporation have no such right.[3] The appointment after judgment has attached, but before sale of the property does not affect the rights of the purchaser.[4] But a prior judgment creditor is not to be allowed under all circumstances to enforce the payment of his claim by the sale of the debtor's property when it is in the possession of a receiver. The court is to consider the rights of all the creditors. If the property is sold by the receiver it will be subject to the judgment lien, or the judgment will be paid out of the fund in the receiver's hands.[5]

The appointment of a receiver is the act of the court, and is not the basis for an action for damages against the applicant.[6] The effect on an insolvent building and loan association of the appointment of a receiver is to mature the debts and mortgages due the association, and they may be collected at once.[7] But it was said in the case cited: "We know of no law that will authorize the receiver to foreclose under the power of sale contained in the mortgages, as we see they were made to the corporation, and the corporation alone is empowered to foreclose by sale." As the receiver succeeds to all the rights of the corporation the statement quoted is not forcible.

Where a corporation borrowed money and directed its officers to pay it over to a creditor, the authority of the officers to do so terminates on the appointment of a receiver of the company.[8]

The appointment of a receiver to take charge of property fraudu-

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[1] Arnold v. Weirner, 58 N. W. R. 709 (Neb.).

[2] Wilder v. City of New Orleans, 67 Fed. R. 567.

[3] National State Bank of Terre Haute v. Vigo County National Bank (Ind.), 40 N. E. R. 799.

[4] Cherry v. Western Washington Industrial Co. 40 Pac. R. 136.

[5] Wheeler v. Walvon & Whann Co. 65 Fed. R. 720.

[6] Sanders v. Tempner (Tex. Civ. App.) 32 S. W. R. 585.

[7] Strauss v. Carolina Inter-State Building & Loan Association, 23 S. E. R. (N. C.) 450.

[8] First National Bank of Crawfordsville v. Dovetail, Body & Gear Co. 42 N. E. R. (Ind.) 934.

lently conveyed, deprives creditors, even judgment creditors, of the right to maintain an action to set aside the transfer.[1] When a receiver of an insolvent insurance company is appointed, all policy-holders are affected without further notice. A loss after the appointment does not give the holder of a policy any right in the distribution greater than those of other policy-holders.[2] The appointment effects a cancellation of the policies, and no assessment for premiums unearned at the time of the appointment can be made.[3] In a statutory proceeding to dissolve an insolvent corporation the receiver "becomes, as soon as he qualifies, by force of the statute, vested with full power to demand, sue for, and take into his possession all the property of every description belonging to the corporation, and to convert the same into money."[4]

The appointment of a receiver does not adjudicate the right of possession.[5] The appointment of a temporary receiver "terminates no right as between the parties, nor does it affect the title to the property in any way. A receiver is appointed merely for the preservation of the property or fund during the litigation; and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place."[6]

A power of attorney, given for a valuable consideration, as security for a loan, to collect rents and apply them to the debt, is not destroyed by the appointment of a receiver of the grantor's property.[7] Such power of attorney is not revocable, whether so declared on its face or not.

Where a receiver has been appointed and the suit is removed on change of venue or to the federal court, the receiver becomes the officer of the latter court and subject to its control.[8]

The effect of a receivership upon the right of the government to collect and enforce its lien for taxes is of importance and may properly be considered here.

A state has a paramount right to collect taxes due on property in the hands of a receiver, and the court should see that such taxes are paid before distribution to other creditors, and this although the

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[1] Passavant v. Bowdoin, 15 N. Y. S. 8.

[2] Reliance Lumber Co. v. Brown, 30 N. E. R. 625.

[3] Davis v. Shearer, 62 N. W. R. 10, 50 (Wis.).

[4] Receiver of Graham Button Co. v. Spielmann, 24 At. R. 571.

[5] Marshall v. Otto, 59 Fed. R. 249.

[6] Davis v. Boney, 17 S. E. R. 229.

[7] Abbott v. Stratton, 3 Jo. & Lat. 603.

[8] *Ex parte* Haley, 99 Mo. 136; McHenry v. New York, Pennsylvania & Ohio Railroad Co. 25 Fed. R. 114.

demand for the taxes was not presented by the collector within the time prescribed by the court for the presentation of claims.[1]

It has been held in Iowa that where a county has acquired no lien for taxes on personal property which has passed into the hands of a receiver, pending litigation concerning the priority of liens which have already attached sufficient to absorb the property, the county has no claim on the property or its proceeds in the hands of the receiver for taxes levied on it; that the statute making taxes a preferred claim in case of assignment for the benefit of the creditors has no application.[2]

Property in the hands of a receiver is subject to taxation, and a proceeding to compel him to return the proper list, will, with the leave of the court, be sustained.[3]

Where statute provided for an annual assessment in banks, in the nature of an excise tax, such tax, it was declared, could not be assessed against a bank in the hands of a receiver, which had been perpetually enjoined from doing business.[4]

The lien of a state for taxes on the property of a railroad company is prior to all other liens whatsoever, except judicial costs. The appointment of a receiver does not disturb such lien; but where, under statute, it was provided that, if an affidavit of illegality be filed, the execution under which property is seized is suspended, and the property is subject to other process, it was held that a court could take possession of the property through a receiver while there was such suspension of the execution, even though the execution be for taxes, but that the state's lien for taxes must be cared for.[5]

Where statute required that the wages due employees of a corporation should be paid in preference to every other debtor's claim,[5] a receiver will not be required to pay the personal tax of the corporation, until the payment first of the wages.[6]

The receiver of an insolvent corporation who has taken possession of its property and is exercising its corporate rights, is a necessary party to a petition by the state for an injunction to restrain the further exercise of any franchise or transaction of any business of the company by him because of non-payment of the state franchise tax.[7]

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[1] Greeley v. Provident Savings Bank, 98 Mo. 458.

[2] Howard v. Strother, 71 Ia. 683.

[3] Spalding v. Commonwealth, 88 Ky. 135.

[4] Commonwealth v. Lancaster Savings Bank, 123 Mass. 493.

[5] State v. Atlantic & Gulf Railroad Co. 3 Woods, 434.

[6] Schenk v. Consumers' Coal Co. 26 Abb. N. C. 356.

[7] *In re* Mather's Sons Co. (N. J. Ch.) 30 At. R. 321.

A federal court has power to enjoin a sheriff from distraining property in the possession of its receiver to enforce the payment of taxes. Property in the hands of a receiver of a federal court is subject to payment of state taxes in the same manner as any other property; but when a receiver believes a tax to be invalid, it is his right and duty to apply to the court appointing him for protection.[1]

The property of an insolvent corporation was held by a receiver, appointed in foreclosure proceedings, the debt amounting to more than the value of the property, and the receiver operating the road and having moneys received from gross earnings sufficient to pay a tax imposed on the corporation, it was held that the state was not confined to the proceedings prescribed by the statute, but the court, on petition and application of the attorney-general, made in the foreclosure suit, and on notice to the corporation and to the receiver, may, in its discretion, make an order directing the receiver to pay the tax out of the gross earnings. The claim of the state for payment of taxes is a permanent one.[2]

An application was made by the receiver of the Wabash Railway Company for an attachment against the collector of a county in Missouri, who issued a warrant and seized an engine of the company, in the possession of the receiver. The application was denied, Brewer, C. J., saying: "It is not represented in the petition that the taxes are not just and legal, or that they are not due. * * * I think that in levying and collecting taxes the state is exercising its sovereign power, and that there should be no interference with its collection of those taxes in its prescribed and regular methods, even by a court having property in the possession of its receivers. * * * The mere fact that the receivers have no money on hand to pay the taxes is no excuse for stopping the process of the state for their collection."[3]

Section 206. **Effect of Collusive and Fraudulent Appointment.** — If one fraudulently secures his own appointment as receiver, he is liable personally for the costs.[4] This was said of a receiver appointed in supplementary proceedings. Where a receiver of a corporation was appointed through the collusion of it and the plaintiff, it was adjudged that the receiver was the representative and agent of the corporation.[5]

[1] *Ex parte* Chamberlain, 55 Fed. R. 704.

[2] Central Trust Co. v. New York City & Northern Railroad Co. 110 N. Y. 250.

[3] Central Trust Co. v. Wabash, St. Louis & Pacific Railway Co. 26 Fed. R. 11.

[4] Robinson v. Wood, 15 N. Y. S. 169.

[5] San Antonio & Aransas Pass Railway Co. v. Adams (Tex. Civ. App.), 32 S. W. R. 733; Texas & Pacific Railway Co. v. Gay, 86 Tex. 571; Texas & Pacific Railway v. Johnson, 76 Tex. 421.

I.

Of the Receiver's Title.

Section 207. **In General of Receiver's Title — Relates Back to Order of Appointment.** — In the earlier cases there is to be found considerable discussion of the question of the receiver's title to the property of which he is put in charge. The common law courts having the power to appoint a receiver only by virtue of enabling statutes, and the courts of chancery not being competent to deal directly with the legal title to property, the matter of the receiver's title came to be regarded a difficulty. Where a complainant in a court of equity was found to be equitably entitled to property, the court originally did not assume to confer upon him the legal title by its decree, but by a proceeding *in personam*, required the respondent to transfer the legal title, either by delivery of possession, or by the due execution of a conveyance valid at law. Subsequently the decree of the court which appointed the receiver, was sometimes deemed sufficient to pass the title, but, as a rule, this was the result of a liberal construction of an enabling statute. Acting on this theory the court formerly held that the order appointing a receiver did not pass the legal title to the property of the defendant, but that the court would compel the defendant to convey the legal title by an assignment effective at law. Thus, Chancellor Walworth, in the case of Wilson v. Wilson,[1] says: "At law an ordinary receiver was not considered as having the legal title, so as to authorize him to institute a suit in his own name for any debt or demand transferred to him, or to the possession or control of which he was entitled under an order of this court, until the act of April, 1845, in relation to the powers of receivers and of committees of lunatics and habitual drunkards."

When the receiver has qualified his title and right to possession relates back to the time of his appointment, but not so far, it has been said, as concerns the rights of third parties.[2]

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[1] 1 Barb. Ch. 592, 594.

[2] *In re* Christian Jansen Co., 128 N. Y. 550. When a receiver qualifies his title relates back to the time of his appointment. As to this principle it has been said: "That doctrine is a fiction of law which was adopted for the advancement of right and justice, and resort is made to it for no other purpose. It is not adopted where third parties, who are not parties or privies, will be prejudiced thereby. In fact, fictions in law are never to be implied to perpetuate a wrong or defeat collateral acts which are lawful and concern strangers. * * * By a fiction of law, his title related back to the day of his appointment, for some purposes, such as its preservation and protection; but not for the purpose of destroying vested

Section 208. **Distinction Between Realty and Personalty in Respect of Title.** — At this point a distinction was made between real property, tangible personalty, choses in action and equitable interests, the title to the last three being transferred by the decree, but the title to real property, passing only by a legal conveyance. "And even this act,"[1] continued Chancellor Walworth, "does not appear to be broad enough to transfer the title of real estate to the receiver, by the mere order of the court, and without an actual conveyance from the party to the suit in whom such title is vested."[2]

So also, it has been held that the order appointing the receiver merely transfers such title to the equitable interests and things in action, as the defendant had when the suit was commenced, and that a subsequent assignment by him to the receiver transfers no additional or greater right to the latter, the effect of the assignment being to vest in the receiver the legal title to that in which he already had the whole equitable interest.[3]

In a recent case the New York Court of Appeals held that it is not a general rule that a receiver can take title from an insolvent person or corporation only by a formal conveyance. The general rule is otherwise, as in the case of receivers appointed in supplementary proceedings, and receivers and assignees in bankrupt proceedings, and in nearly all cases the appointment of receivers of insolvent corporations. The title of a receiver to real and personal property in such cases, both in this country and in England, is generally statutory, and does not depend upon any formal conveyance.[4] Where a partnership is in the course of dissolution, and a receiver is appointed of its assets, the receiver takes the whole equitable title to the partnership property without an assignment, and represents the interests in such property of all parties to the suit in which he was appointed.[5] The court, by a proceeding for con-

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rights, or for any other unjust purpose." Held, in this case, that where a judgment was entered after appointment of receiver, but before he gave bond and had taken possession, and an execution has also issued to sheriff which, by statute, became a lien, the lien of the execution was superior to the rights of the receiver. Lewis & Fowler Mfg. Co. *in re*, 34 N. Y. S. 983. The current of the authorities is to the contrary. See section 217.

[1] Laws of 1845, p. 90.

[2] Wilson v. Wilson, *supra*. *Acc.* Storm v. Waddell, 2 Sandf. Ch. 494; Iddings v. Bruen, 4 Sandf. Ch. 223, 252 and 417; Wilson v. Allen, 6 Barb. 542; *Cf.* Albany City Bank v. Schermerhorn, Clarke's Ch. (N. Y.) 297; Mann v. Pentz, 2 Sandf. Ch. 257; Scouten v. Bender, 3 How. Pr. 185; Tillinghast v. Champlin, 4 R. I. 173.

[3] Iddings v. Bruen, 4 Sandf. Ch. 223, 252.

[4] Attorney-General v. Atlantic Mutual Life Ins. Co. 100 N. Y. 279.

[5] Tillinghast v. Champlin, 4 R. I. 173.

tempt, compelled obedience to its decree, and prevented an interference with the possession of the receiver.[1]

Section 209. **Generally What Title and Property Receiver Takes—Temporary and Permanent Receivers.**—Under statutory provision that receivers shall "take possession of all property, evidences of property, books, papers, debts, choses in action and estate of every kind of the debtor," it was held that the receiver was entitled to a patent right belonging to the debtor; for "though not liable to attachment on account of its intangible or incorporeal character," it is property.[2]

As the appointment of a receiver *pendente lite* is only for the purpose of preserving and protecting the property during the litigation, his appointment affects only the right of possession, not the title, which remains unchanged.[3]

But in some jurisdictions it has been asserted that the appointment of the receiver vests the title of personal property in him;[4] but not of railroad property.[5]

When the defendant refused to turn money over to the receiver, the court, by attachment, compelled him to do so.[6]

A receiver has no right to the possession of property pledged by the defendant before the appointment for a loan.[7] A receiver appointed in one state does not take title to property in another.[8]

In a statutory proceeding by the attorney-general for the dissolution of a corporation and the winding up and distribution of its effects, it was held that the receiver became invested with the title to all the corporation's property, wherever situated, whether in or without the state; and this though the statute did not so provide.[9]

When there has been an assignment of title to the receiver his right to the title is by reason of such assignment rather than the appointment.[10] A receiver of a partnership, appointed at the

[1] See, for a full consideration of this subject, the concluding sections of this chapter. Text cited and approved in Ryan v. Kingsbury, 88 Ga. 361.

[2] Keach v. Chadwick, 14 R. I. 571. As to subjecting letters patent to writs of attachment and execution see Alderson's Judicial Writs and Process, section 152.

[3] See section 225; Keeney v. Home Insurance Co. 71 N. Y. 396; City of Brooklyn v. Jourdan, 7 Abb. N. C. 23.

[4] Skinner v. Terhune, 45 N. J. E. 565; Ryan v. Kingsbury, 88 Ga. 361.

[5] Abbey v. International and Great Northern Railway Co. 5 Tex. Civ. App. 261.

[6] Ryan v. Kingsbury, 88 Ga. 361.

[7] National Exchange Bank v. Benbrook School Furnishing Co. (Tex. Civ. App.) 27 N. W. R. 297.

[8] Simpkins v. Smith & Parmalee Gold Co. 50 How. Pr. 56.

[9] American National Bank of Denver v. National Benefit and Casualty Co. 70 Fed. R. 420.

[10] Swing v. White River Lumber Co. 65 N. W. R. 174.

instance of one of the partners, takes the property of the firm in trust for the partners and their creditors.[1]

Debts due from persons in foreign jurisdictions, without the aid of legislation, do not pass to a receiver by virtue of his appointment.[2]

A receiver of an insurance company is said not to become vested with the title to its bonds and money before the annulment of its charter.[3] The receiver of an insolvent bank has been declared to hold the same estate and title of the bank in its assets as an assignee in bankruptcy.[4]

A receiver succeeds to all the property rights of the insolvent corporation, and has authority to sue to enforce obligations due it.[5]

The proposition that a temporary receiver does not take the title to any property is to be qualified by the statement that, if, in pursuance of order of the court, he sells any personal property, the purchaser receives good title.[6]

It is the rule that a permanent receiver becomes invested with title to the defendant's personal property; and it is the prevailing doctrine that such receiver also takes title to real property, and, under order of the court, may sell and convey the same with perfect title. It is the practice in some jurisdictions to require the defendant to convey the realty to the permanent receiver; but on reason the requirement is useless.

The universal rule is that the permanent receiver of an insolvent corporation becomes invested with the title to all of its property, both personal and real.

A receiver takes property subject to the equitable right of a mortgagee to have the description reformed so as to include all of the property intended to be conveyed.[7]

Section 210. **When a Formal Assignment to the Receiver will be Required.**— As has been already shown, the order appointing a receiver does not in general confer such a title as will be recognized in a court of law, and, in order to enable the receiver to maintain an action in such a court, it is necessary for him to have a title that

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[1] Rand v. Wright, 39 N. E. R. 447.

[2] Amy v. Manning, 149 Mass. 487.

[3] Brooks v. Town of Hartford, 61 Conn. 112.

[4] Casey v. La Societé de Credit Mobilier de Paris, 2 Woods, 77.

[5] Davis v. Ladoga Creamery Co. 128 Ind. 222.

[6] "A receiver *pendente lite* is the custodian of the property." Harlan v. Bankers & Merchants' Telephone Co. 32 Fed. R. 305.

[7] Ryder v. Ryder (R. I.), 32 At. R. 919.

will be recognized there. The court will, therefore, often order the defendants to execute to its receiver a formal assignment of all their property, equitable interests, etc., "in order to enable the receiver to test the validity of any assignment, or other disposition, they might have previously made of their property, and to bring a suit in his own name in cases in which he was legally authorized to sue in that manner, either at law or in equity."[1] And this may be required even though the defendants swear that they have no property in their possession, or under their power and control.[2]

The power of the court to require the debtor to execute an assignment of his property to the receiver extends to an assignment of letters-patent.[3]

"Where from the peculiar nature of the property coming into the hands of the receiver some further conveyance than the usual assignment from the debtor to the receiver is necessary to vest in the receiver the complete legal title and enable him to dispose of the property to advantage, and to protect it while he holds it, the court *ex necessitate* must have the power to compel the judgment debtor to execute such further conveyance."[4]

Section 211. **As to Real Property.**— As has been previously stated the order appointing a receiver does not, as a rule, operate to confer upon him any title to real property, and so in order to vest the title a formal conveyance is necessary.[5] But even in the case of a conveyance by the defendant, the receiver gets his title only at the time of the conveyance.[6]

In the case of Chautauqua County Bank v. Risley,[7] the defendant conveyed his property to a receiver, and subsequently a judgment creditor, elder than the one at whose suit the receiver was appointed, levied on the property under an execution and sold it, and it was held that the purchaser acquired a title superior to that of the receiver. In supplementary proceedings also, which are in their nature essentially statutory, a conveyance is, in general, necessary to vest the title to the defendant's real estate in the receiver, the legislature hesitating, upon grounds plainly adequate, to disturb the common law rule.[8]

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[1] Chipman v. Sabbaton, 7 Paige, 47. *Cf.* Fincke v. Funke, 25 Hun, 616.

[2] Chipman v. Sabbaton, *supra.*

[3] Keach v. Chadwick, 14 R. I. 571.

[4] Atkinson v. Foster, 27 Ill. App. 68.

[5] Wilson v. Wilson, 1 Barb. Chan. 592; St. Louis & Sandoval, etc. Co. v. Sandoval, etc. Co. 111 Ill. 32; Moak v. Coats, 33 Barb. 498. *Cf.* Porter v. Williams, 9 N. Y 142.

[6] Moak v. Coats, 33 Barb. 498.

[7] 19 N. Y. 369.

[8] Scott v. Elmore, 10 Hun, 68.

Section 212. **What Property Passes Under an Assignment to a Receiver.**— When a receiver is appointed merely of the money, property, things in action and effects of the defendant, it is necessary for him, if directed to execute an assignment of such property, to include only that mentioned in the order, and, under the general words used, only the property and effects will pass in which the defendant had some beneficial interest at the commencement of the action. If the defendant have already executed an assignment to a receiver appointed in a prior suit, the second assignment will not affect the property covered by the first, except so far as he may still have an interest in it; and this is the rule in order that the second receiver may have the right to claim from the first any proceeds which are not needed to satisfy the claims of the plaintiffs in the first suit.[1]

Section 213. **As to Trust Property, Choses in Action and Equitable Interests.**— It is not necessary that the assignment should contain an express reservation of property which is held merely in the character of trustee for others, upon a valid and subsisting trust, and in which property the defendant has no beneficial interest. But it should contain an exception which will prevent the legal title to property, exempt by law from sale or execution, from passing to the receiver, the reason being that the exemptions vary as the defendant is or is not a householder, and are also subject to waiver.[2]

A right of action for injury to property to which a creditor may resort for payment of his debt, and which is lessened in value or destroyed by such injury, is a chose in action which should be included in the assignment to a receiver. But a right of action for a personal tort, as libel, assault and battery, cannot be reached by a creditor's bill and will not pass to the receiver.[3]

It has been held that an assignment to a receiver resembles, to such an extent, a mortgage for the payment of the judgment and costs, that when that is satisfied the assignment ceases to be of any force and no re-assignment is necessary.[4] Where receivers of the property of a corporation are appointed, an assignment passes its rights and property precisely in the same shape and condition, and

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[1] Cagger v. Howard, 1 Barb. Ch. 368.

[2] Cagger v. Howard. *supra*. *Cf.* Fitzhugh v. Everingham, 6 Paige, 29.

[3] Hudson v. Plets, 11 Paige, 180. See also §§ *et seq. infra*.

[4] Anderson v. Treadwell, Edm. Sel. Cas. 201.

subject to the same equities under which they were held by the corporation.[1]

Section 214. **The Rule in Supplemental Proceedings—What Receiver Takes.**—The most frequent exercise of the power of appointing receivers was formerly that in a creditor's suit, an equitable remedy, which has now largely given place to a statutory proceeding at law. In this modern statutory action, termed a proceeding supplementary to execution, the receiver's title being wholly statutory, is vested in him, as a rule, upon compliance with the terms of the order by which the appointment is made.[2] The defendant is not required to make an assignment, inasmuch as the order transfers his title.[3]

It has been recently held by the New York supreme court that the title of a judgment debtor to real property vests in the receiver appointed in supplementary proceedings from the time of filing the order, or a certified copy thereof, in the office of the clerk of the county where the property is situated.[4] But it is held that, as to property previously transferred, or assigned, by the debtor in fraud of his creditors, the receiver obtains no title under the order; he merely acquires a right of action to set aside the transfer.[5] And this right is lost if an assignee in bankruptcy be appointed.[6]

A receiver in supplementary proceedings takes and has power to sell and assign a membership in a stock exchange.[7] He takes no title, however, to property acquired by the debtor after the appointment.[8]

Section 215. **The Effect of an Irregular or Erroneous Appointment.**—The effect of irregular or erroneous appointments of receivers will be considered fully in the sections upon contempt. It is generally in such proceedings that the question arises, the defendant attempting to evade the effects of an appointment on account of some irregularities, by refusing to comply with the order. Gene-

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[1] Receivers v. Paterson Gas Light Co. 23 N. J. Law, 283.

[2] Moak v. Coats, 33 Barb. 498; Scott v. Elmore, 10 Hun, 68; Cooney v. Cooney, 65 Barb. 524; Mandeville v. Avery, 124 N. Y. 376.

[3] See the cases last cited; Porter v. Williams, 9 N. Y. 142. *Cf.* Chatauqua Co. Bank v. Risley, 19 N. Y. 369.

[4] Smith v. Tozer, 11 N. Y. Civ. Proc. Rep. 343 (1886). *Cf.* Wing v. Disse, 15 Hun, 190; Manning v. Evans, 19 Hun, 500; Fessenden v. Woods, 3 Bosw. (N. Y.) 550.

[5] Bostwick v. Menck, 40 N. Y. 383; Olney v. Tanner, 10 Fed. Rep. 101; s. c. (affirmed) 21 Blatchf. 540; Miller v. Mackenzie, 29 N. J. Eq. 291.

[6] Olney v. Tanner, *supra*.

[7] Habenicht v. Lissak, 78 Cal. 351.

[8] Norcross v. Hollingsworth, 31 N. Y. S. 627.

rally speaking, the court pays no attention to such objections, deeming them to be made in bad faith. As a rule the proper way in which to get rid of an irregular or erroneous appointment is by a direct proceeding to set it aside, and for an order staying the proceedings under it in the meanwhile.[1]

This question has frequently arisen in cases where the court has granted an injunction, and a person, holding the injunction to have been erroneously or improvidently granted, has paid no attention to it. It has generally been held a contempt of court to disregard the injunction whether it was properly granted or not.[2]

Section 216. **The English Rule Herein.**—Lord Truro aptly says in Russell v. East Anglian Railway Co.[3] that "the result appears to be this: That it is an established rule of this court that it is not open to any party to question the orders of this court, or any process issued under the authority of this court, by disobedience. I know of no act which this court may do, which may not be questioned in a proper form, and on a proper application; but I am of opinion that it is not competent for any one to interfere with the possession of a receiver, or to disobey an injunction, or any other order of the court, on the ground that such orders were improvidently made. Parties must take a proper course to question their validity, but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public, and to the due administration of justice, that it ought on all occasions to be inflexibly maintained. I do not see how the court can expect its officers to do their duty, if they do it under the peril of resistance, and of that resistance being justified on grounds tending to the impeachment of the order under which they are acting."

In this country where a statute, under which receivers may be appointed to settle the affairs of banking corporations, requires them to be sworn, it has been held that the omission to be sworn does not vitiate their proceedings, upon the ground that they are officers of the court and their proceedings are subject to its revision.[4]

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[1] Howard v. Palmer, Walk. (Mich.) 391; Ames v. Trustee of Binkenhead Docks, 20 Beav. 332; Russell v. East Anglian R. R. Co. 3 Mac. & G. 104; Cook v. Citizens' Nat. Bank 73 Ind. 256; Richards v. People, 81 Ill. 551.

[2] People v. Sturtevant, 9 N. Y. 263; Moat v. Holbein, 2 Edw. Ch. 188; Woodward v. Earl of Lincoln, 3 Swanst. 626; Sullivan v. Judah, 4 Paige, 444; Richards v. West, 8 N. J. Eq. 456.

[3] 3 Mac. & G. 104.

[4] American Bank v. Cooper, 54 Me. 438.

Section 217. **At What Time the Receiver's Title Vests and His Right of Possession Accrues — They Date Back.**—Courts have been involved in much controversy in regard to the question as to when the defendant's title becomes vested in the receiver. Courts of equity have always insisted strenuously upon the doctrine of *lis pendens*, and yet have found it difficult and often inequitable to enforce it. But the courts have now, as a rule, come to the conclusion that the title of a receiver, on his appointment, dates back to the time of granting the order, even though certain preliminary conditions must be first performed and the receiver remains out of possession pending such performance. This is the result of the theory that upon the commencement of proceedings for the appointment of a receiver, an equitable lien is created in favor of the plaintiff.[1]

Thus, where the order appointing a receiver provided that, before acting, he should give security, it was held that when the security was perfected, the title vested in him as of the date of his appointment and would defeat an intermediate levy.[2] But if the levy is made under an execution issued on an earlier judgment and the property is sold, the purchaser will get a better title than a receiver from an assignment subsequently executed, although the order appointing him was made before the levy.[3]

Where a suit was commenced to set aside a preferential assignment by one of the partners, who had not joined in it, the prayer of the bill being for the appointment of a receiver, and the court made an order granting a receiver, but ordered a reference to select a suitable person, the title of the receiver appointed was held to date back to the order of reference, and so defeated a levy made in the meantime.[4]

But where there is an appeal from the order appointing a receiver and a stay of proceedings is obtained, the receiver acquires no title until he takes possession after the affirmance of the order,[5] and the receiver, as of course, can not act as such until he has performed all the conditions precedent to his appointment, such as giving a bond

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[1] Storm v. Waddell, 2 Sandf. Ch. 494; Smith v. New York Consolidated Stage Co. 28 How. Prac. 377.

[2] Wilson v. Allen, 6 Barb 542; Steele v. Sturges, 5 Abb. Pr. 442; Maynard v. Bard, 67 Mo. 315.

[3] Chautauqua Co. Bank v. Risley, 19 N. Y. 369; Artisan Bank v. Treadwell, 34 Barb. 553.

[4] Rutter v. Tallis, 5 Sandf. Super. Ct. (N. Y.) 610; Deming v. N Y. Marble Co. 12 Abb. Pr. 66. *Cf.* Farmers' Bank v. Beaston, 7 Gill. & J. 421; *In re* Berry, 26 Barb 55.

[5] Cole v. Cole, 55 Iowa, 70.

and any other matter required in the order of appointment.[1] A contrary rule prevails in Maryland, where it is held that the title of the receiver does not vest until he reduces the property of the defendant to possession.[2]

Where a partner makes an application for a receiver of the copartnership effects, for the purpose of liquidating its debts, it has been held that the court will compel him to pay over to the receiver assets collected by him shortly prior to his application.[3] And where the order appointing a receiver authorized him to collect the rents of certain property and, if necessary, to sue for them, he is subrogated to the defendant's title, and his right of action will relate back to the commencement of such title.[4]

It is the order appointing a receiver that affects the property of the insolvent; and there can be no valid and intervening rights between the time of appointment and the qualifying of the receiver. The court has jurisdiction over the property though the receiver has not actually seized and taken the same into his possession. The title to the property vests in the receiver on his appointment. When he qualifies his title relates back to the time of his appointment.[5]

The courts have now, as a rule, come to the conclusion that the title of a receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance.[6]

It is the rule that the order of appointment, followed by the receiver qualifying, affects and holds the property, so that neither the defendant nor his creditors can do aught in the interim to prejudice the receiver's right of possession.[7]

The United States circuit court of appeals has declared recently that a judgment rendered against the debtor defendant after the appointment of a receiver and before he qualifies is inferior to the receiver's right of possession.[8]

Section 218. **Limitations Upon the Receiver's Title — Prior Liens.** — It is a general rule that the receiver obtains title subject

[1] Phillips v. Smoot, 1 Mackey, 478.
[2] Farmers' Bank v. Beaston, 7 Gill. & J. 421.
[3] Murphy v. Du Berg. 11 Abb. N. C. 112.
[4] Hardwick v. Hook, 8 Ga. 354.
[5] *In re* Schuyler's Steam Tow Boat Co. 136 N. Y. 169.
[6] Pope v. Ames, 20 Oreg. 199.
[7] *In re* Berry, 26 Barb. 55; Dickey v. Bates, 35 N. Y. S. 525; Mosher v. Order of Iron Hall, 34 Id. 816.
[8] Connecticut River Banking Co. v. Rockbridge Co. (U. S. C. C. App.) 73 Fed. Rep. 709.

to all liens previously acquired;[1] but this rule is applicable only to property which is subject to levy and sale under execution. As to other property such, for example, as equitable interests, the commencement of the action for the appointment of a receiver creates a lien in favor of the plaintiff.[2]

In New York where the sheriff levied on certain personal property under an execution issued on a judgment, and subsequently the judgment creditor on a prior judgment, executions on which had been returned *nulla bona*, instituted proceedings for examining the debtor, and a receiver appointed in that proceeding took possession of the property levied on, the levy having been made after the commencement of the proceedings, but before the appointment of the receiver, it was decided that the receiver took title subject to the levy.[3] Creditors who have obtained a lien on the real property of a debtor, by judgments obtained before the appointment of a receiver, may maintain an action to discharge the land from the lien of a mortgage shown to be fraudulent.[4] And property held as collateral security for a contingent liability, as that of indorser of a note, may be held against a receiver appointed during the pendency of an administration suit.[5]

Where a bank has retained counsel to foreclose a mortgage held by it, and subsequently a receiver is appointed of the assets of the bank, the lien of the attorneys for services rendered in that action is superior to the title of the receiver, but it seems, will not extend to services rendered in other actions or to separate members of the firm.[6] As a general rule the receiver gets only such title as the defendant or judgment debtor has to the estate of which he takes possession.[7] He can not maintain replevin for property reduced to possession by creditors under levies,[8] and a lien for unpaid taxes is superior to his title.[9] Where one is in possession of

[1] Mulcahey v. Strauss, 37 N. E. R. 702.

[2] Storm v. Waddell, 2 Sandf. Ch. 494, 516; Van Alstyne v. Cook, 25 N. Y. 489; Davenport v. Kelly, 42 Id. 193; Lansing v. Easton, 7 Paige, 365; Edmeston v. Lyde, 1 Id. 637; Corning v. White, 2 Id. 567; Becker v. Torrence, 31 N. Y. 631; Gere v. Dibble, 17 How. Pr. 31.

[3] Becker v. Torrence, 31 N. Y. 631.

[4] Gere v. Dibble, 17 How. Pr. 31.

[5] Brady v. Furlow, 23 Ga. 613.

[6] Bowling Green Bank v. Todd, 64 Barb. 146.

[7] Crine v. Davis, 68 Ga. 138; *In re* North America Gutta Percha Co. 17 How. Pr. 549; s. c. 9 Abb. Pr. 79; Rich v. Loutrel, 18 How. Pr. 121; Bell v. Shibley, 33 Barb. 610; Van Roun v. Superior Court, 58 Cal. 358; Lorch v. Aultman, 75 Ind. 162. But see Clark v. Brockway, 3 Keyes (N. Y.), 18.

[8] Conley v. Deere, 11 Lea (Tenn.), 274.

[9] Central Trust Co. v. Wabash, St. Louis, etc. R. R. Co. 26 Fed. Rep. 11; Union Trust Co. v. Weber, 96 Ill. 346.

a fund, which he is entitled to hold as security for the payment of certain notes upon which he is an accommodation endorser, he can not, where no danger to the fund is shown, be required, upon the death of the person for whose benefit the endorsements were made, to pay it over to a receiver of the intestate's effects, but he may properly have possession of it until the payment of the notes.[1]

Section 219. **Following Trust Funds in Possession of Receiver.** — It is an elementary proposition that the rights of a receiver as to third parties are not in any respect superior to those of the defendant, and that the property is taken subject to all existing equities. The rule that a fund impressed with a trust may be followed into the possession of third parties is applicable to receiverships.[2] When a corporation had declared a dividend and a fund had been deposited for the purpose of paying it, and one of the stockholders of the company failed to draw the amount due him, and a receiver of the company was appointed and took possession of the fund, it was adjudged that he held it in trust for the person entitled to it, who could follow and claim it in the receiver's possession.[3]

Section 220. **Property Exempt from Levy of Execution.** — In New York it is held that an order appointing a receiver of the property of an insolvent debtor operates to transfer nothing that is by law exempt from seizure and sale under an execution. Thus an action for conversion was maintained where a receiver, in such a case, claimed possession of a horse which belonged to the judgment debtor, and was exempt from levy of execution, the court holding that the sale of such property by the receiver was a conversion for which the debtor might have his action.[4] And where the complainants in a creditor's bill demanded that certain property should be subjected to the payment of their judgment, under a lien acquired by the levy of their writ of *fieri facias*, and by the service of process under their bill, and the receiver of the owner, intervening, showed a prior lien and an assignment by the owner to satisfy prior judgments, it was held that the complainants were not entitled to priority on the ground claimed.[5] Where, however, the defendant is ordered to deliver his property to a receiver, if it is alleged that

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[1] Brady v. Furlow, 22 Ga. 613.

[2] *In re* Le Blanc, 121 Hun, 8; affirmed, 75 N. Y. 598; Heniko v. Heineman (Wis.), 63 N. W. R. 1047; Arnot v. Bingham, 55 Hun, 553; Ryan v. Paine, 66 Miss. 678.

[3] *In re* Le Blanc, 14 Hun, 8; affirmed, 75 N. Y. 598.

[4] Finnin v. Mallory, 33 New York Super. Ct. 382.

[5] Swift's Iron & Steel Works v. Johnsen, 26 Fed. Rep. 828, 830 (1886).

the defendant has fraudulently assigned to an insolvent assignee, the plaintiff should apply to have the receivership extended to such assignee.[1]

Section 221. **The Proceeds of Insurance Policies Upon Exempt Property and Claims for Damage Thereto.**—The general rule that the receiver does not take title to property exempt by law from levy and sale under execution by virtue of the order of his appointment, has been extended to include the proceeds of insurance policies upon such property when damaged or destroyed, and to all causes of action arising from injury to the same.[2]

In neither case does the debtor voluntarily part with his property, and so cannot be said to waive any claim to the exemption. In Cooney v. Cooney[3] the receiver's motion for an order directing the defendant to execute an assignment to him of a policy of insurance upon property exempt by law from levy of execution which had been destroyed, and of all claims arising thereunder, was denied, the court holding that the insurance company was liable to replace the property, or to pay its value in money, and that the defendant had a reasonable time, after it had elected to pay in money, to replace the articles destroyed if he had not used other means for that purpose. And this rule applies whether the property is destroyed before or after the appointment of the receiver.[4]

The same principle has been extended to causes of action for damages to, or conversion of, exempt property, the reason being that the cause of action grows out of an injury to property which the creditor can in no case apply to the payment of his debt. In the case of a conversion, the judgment debtor has plainly the option to sue for damages or to bring an action of replevin to recover the specific property. In Hudson v. Plets[5] the plaintiff asked for an attachment against the debtor for contempt, upon the ground that he had been guilty of a breach of the usual injunction, contained in the order appointing the receivers, in bringing an action to recover damages for an injury to property which was exempt from execution; but the court held that there was no breach, for the reason that the exemption would be useless if the creditor could seize such property and sell it under an execution.

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[1] Cassilear v. Simmons. 8 Paige, 273.

[2] Cooney v. Cooney, 65 Barb. 524; Tillotson v. Wolcott, 48 N. Y. 188; Sands v. Roberts, 8 Abb. Pr. 348; Andrews v. Rowan, 28 How. Pr. 126.

[3] 65 Barb. 524.

[4] Sands v. Roberts, 8 Abb. Pr. 343.

[5] 11 Paige, 180.

Section 222. **Trust Funds and Pensions.**—Where the judgment debtor is entitled to the income of certain trust funds, without having possession or control of the fund, the receiver is entitled only to such portion of the income, if any there be, as can be shown to be not necessary for the proper maintenance of the *cestui que trust*.[1]

The court will not, and can not, infer that any such surplus exists, and it will be necessary for the complainant to present, by proper averments, such a fact in his pleading, and any omission to do so is a substantial defect of which advantage may be taken by a demurrer.[2] But in New York in Campbell v. Foster[3] it was held that "property held in trust for the debtor where the trust has been created by, and the fund so held in trust has proceeded from, some person other than the debtor himself" could not, under any circumstances, be reached by a creditor in supplementary proceedings, and strong doubts were expressed whether, under the general principles of equity jurisprudence, the court of chancery had any power to reach such a fund, whether it consisted of the income of real or personal estate. And subsequently in the same state, in Williams v. Thorn,[4] it was again decided that where the debtor was a beneficiary under a trust, by which he received the income of certain property, and an execution was issued on a judgment obtained against him, and returned unsatisfied, the creditor could maintain an action to recover only the surplus over what was necessary for the suitable support and maintenance of the beneficiary and those dependent upon him. But in McEwen v. Brewster[5] it was intimated that, while such surplus could not be reached by a receiver in supplementary proceedings, a direct action might be brought to subject it to the payment of the debt.[6]

In Nagle v. Stagg[7] it was decided that a receiver was not entitled to moneys due a debtor for a pension, and the court said: "A pension is an allowance without consideration, and the payments of it are not made pursuant to any contract or obligation, but each payment is voluntary and may be withheld by the government that grants it, pursuant to the conditions attached to the grant. The debtor has no property in any payments to be made on account of the pension, before actual payment. Any sum already paid on ac-

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[1] Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361; McEwen v. Brewster, 17 Hun, 223; Manning v. Evans, 19 Hun, 500.

[2] Graff v. Bonnett, 31 N. Y. 9, 15.

[3] 35 N. Y. 361.

[4] 70 N. Y. 270.

[5] 17 Hun, 223.

[6] Manning v. Evans, 19 Hun, 500.

[7] 15 Abb. Pr. (N. S.) 348.

count of the pension to the debtor, or accrued prior to the appointment of a receiver, may be seized by the latter when such sum has been actually paid to the debtor, but not before."

Section 223. **Effect on Receiver's Right of Possession of Levy Under an Execution — Liens of Prior Judgments.**—Receivers are not entitled to the rights of *bona fide* purchasers of the property of which the court places them in charge, and, as a rule, they get no better title than the former owner, but it is nevertheless held that if, in the time between the appointment of a receiver and the time when he takes possession, a judgment creditor levies on the property, even though without fraud or collusion with the debtor, such levy is not a lien superior to that of the receiver's title.[1]

In Steele v. Sturges[2] the order appointing a receiver required him, before entering upon his duties, to give security for their due performance. After the making of the order, but before the receiver's bond had been filed, the sheriff levied on some of the debtor's property. It was held that when the bond was filed the sheriff must surrender possession. But if the judgment was obtained before the appointment of the receiver, he takes subject to those judgments, and if he take possession of the property subsequently to a levy, he must account to the sheriff for the amount thereof.[3]

In the case of the Chautauqua County Bank v. Risley[4] there was an action of ejectment brought to recover certain real property, the common source of title being one S, who had assigned his estate for the benefit of creditors. The assignment was set aside as fraudulent by a creditor who had obtained a judgment subsequent to it, and a receiver was appointed, to whom S made an assignment. This receiver sold to the defendant's lessor, and the plaintiff claimed title under a sheriff's sale subsequent to the sale to the defendant's lessor, under a judgment recovered before the filing of the bill. To this action the second judgment creditor was a stranger. The plaintiff's title was held superior to defendant's, it being further

[1] Text approved in Mosher v. Order of Iron Hall, 27 N. Y. 318. Gouverneur v. Warner, 2 Sandf. Super. Ct. 624; Fessenden v. Woods, 3 Bosw. (N. Y.) 550; Rich v. Loutrel, 9 Abb. Pr. (N. Y.) 356; s. c., 18 How. Pr. 121; Steele v. Sturges, 5 Abb. Pr. 442; *In re* North American Gutta Percha Co. 17 How. Pr. 549. *Cf.* Van Alstyne v. Cook, 25 N. Y. 489.

[2] 5 Abb. Pr. 442.

[3] Cherry v. Western Washington Industrial Co. 40 Pac. R. 136; Rich v. Loutrell, 9 Abb. Pr. 356; s. c., 18 How. Pr. 121; *In re* American Gutta Percha Co. 17 How. Pr. 549. *Cf.* Rutter v. Tallis, 5 Sandf. Super. Ct. 610.

[4] 19 N. Y. 369.

held that the purchaser from the receiver took by virtue of the assignment subject to prior liens, but free from liens held by the parties to the suit.[1]

In Wiswall v. Sampson,[2] in an action of ejectment, the plaintiff below, defendant in error, claimed title through an execution sale founded on a judgment, and the defendant through a sale by a receiver appointed in proceedings on a judgment subsequent to that on which the execution had been issued. The execution sale, however, was later than the appointment of the receiver, and the sale was declared invalid and void, the court saying, " that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose." As, of course, the receiver's title is superior to a subsequently docketed judgment.[3]

Where filing bill and service of process are necessary to give jurisdiction, a judgment rendered in the interim is a lien paramount to the receiver's right.[4] But it was held in the case cited that it does not follow that a prior judgment creditor should be allowed under all circumstances to enforce the payment of his claim by the sale of the debtor's property when in the hands of a receiver. The court must look to the rights of all the creditors. If the property is sold by the receiver it will be sold subject to the lien, or the judgment will be paid out of the fund in the receiver's hand.

Property in the possession of a receiver cannot be sold under an execution without leave of the court, although the levy was made before the appointment of the receiver. Such a sale is said to be void. It was declared that the lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver, and the property could not be taken out of the possession of the receiver and sold upon the execution without leave of the court, that the execution creditor should have brought his lien to the attention of the court and asked to have the execution paid out of the proceeds of the property.[5]

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[1] *Cf.* Artizans' Bank v. Treadwell, 34 Barb. 553.

[2] 17 How. (U. S.) 52.

[3] Jermain v. Hendricks, 100 N. Y. 279; s. c., 3 N. E. Rep. 193 (N. Y. Ct. App.); Edwards v. Norton, 55 Tex. 405; Jackson v. Lahee, 114 Ill. 287; McGowan v. Myers, 66 Iowa, 99.

[4] Wheeler v. Walton & Whann Co., 65 Fed. R. 720.

[5] Walling v. Miller, 108 N. Y. 173; Conley v. Deere, Mansur & Co. 11 Lea,

But a receiver has no right to the possession of property which was actually seized under process prior to his appointment.[1] The sale of property by a receiver does not destroy the liens of prior judgments,[2] and the appointment of a receiver does not remove the lien of a prior attachment.[3]

Section 224. **Set-Off.**—In Clark v. Brockway[4] it appears that one William Sherman, on September 1, 1856, made a general assignment for the benefit of his creditors; on October 13, following, the assignment was set aside, at the suit of a creditor, as fraudulent, and a decree to that effect was entered on October 13, 1857, directing the payment of the creditor's claim, and appointing one Clark receiver. Between the commencement of this suit and the entry of the decree, Brockway delivered to the assignees, as such, two promissory notes, which subsequently passed into the hands of the receiver; but prior thereto he had become the owner of a promissory note made by Sherman before he made the assignment, on which he recovered judgment on October 22, 1857. It was held that he was not entitled to have the judgment in his favor set off against one on his notes obtained at the suit of the receiver, because that would have operated to give him a preference over the creditor on whose application the receiver had been appointed.

As to the right of set-off in general in these cases there seems to be much doubt and uncertainty in the decisions. On the one hand, it is held that the right does not exist, upon the ground that the estate of a debtor is a trust fund in the hands of the receiver for the benefit of all the creditors, and that if any one creditor were to be allowed to set off his own debts, he would by so much obtain a preference. Accordingly there is a line of cases to the effect that the creditors must pay into the fund all the debts owed to it, and then that this fund may be divided proportionately among all, paying all the claims wholly or in part as the amount of the fund will admit. A distinction may be drawn between cases where the action is for the benefit of all the creditors, and those in which it it is for the benefit of only one or more. Sometimes the bill is filed for and in behalf of all the creditors, and then it seems plain that the right of set-off should not be allowed.[5] But where the

274; Scott v. Farmers' Loan & Trust Co. (U. S. C. C. Ap.) 69 Fed. R. 17.

[1] State ex rel. Perkins v. Graham, 36 Pac. R. 1085.

[2] Lebanon Brewing Co., In re, 3 Pa. D. R. 260.

[3] Garham v. Mutual Aid Society (Mass.), 37 N. E. R. 447.

[4] 3 Keyes (N. Y.) 13.

[5] Haxton v. Bishop, 3 Wend. 13.

complainant seeks the appointment of the receiver simply as a means of obtaining possession of the property of the debtor, not intending that any creditor other than himself shall receive any benefit, then the right should be allowed, especially when the other creditors are strangers to the suit and have no notice of its pendency. It can, however, hardly be said that the cases sustain this distinction.[1]

It is now the general rule that the right of set-off exists. This results logically from the rule that the rights of the receiver are no greater than those of the owner of the estate he administers, the debtor.[2] The receiver is, in no respect, a purchaser for value.[3]

An equitable interest in an insolvent debtor's estate is vested in a receiver by his appointment, who takes the assets of the debtor as a trust fund for the equal benefit of all the creditors of the estate. The receiver can acquire no greater interest than the debtor had in the estate, and choses in action pass to the receiver subject to the equitable right to set-off existing at the time of his appointment. When a receiver is appointed the accounts of the insolvent debtor are closed, and no changes can thereafter be made by any assignment of credits against the estate.[4]

Section 225. **Title of Receiver Pendente Lite.**—Where actions are brought to try the title to specific property, or the business of a partnership is to be wound up, or a corporation to be formally dissolved, and it is for any reason proper or necessary to preserve the property from waste or deterioration pending the action, it is the usual procedure to apply to the court for the appointment of a receiver, whose duty it shall be to take into his possession all the property which is involved in the controversy or other proceeding, and preserve it subject to whatever final decree may be made. The title of such a receiver is clearly and concisely defined by Andrews, J., in Keeney v. Home Insurance Company:[5] "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided.

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[1] *In re* Receiver of Middle District Bank, 1 Paige, 585; Berry v. Brett, 6 Bosw. (N. Y.) 627; Lawrence v. Nelson, 21 N. Y. 158; Holbrook v. Receiver of American Fire Insurance Co. 6 Paige, 220.

[2] Bedell v. American Life Insurance Co. 7 Daly, 273; Mechanics' National Bank v. Landauer, 68 Wis. 44; Stone v. Dodge, 96 Mich. 514; Van Dyck v. McQuade, 85 N. Y. 616; Warde v. Hudson, 96 Mich. 432; Wells v. Street, 38 Fed. R. 807; Lincoln v. Fitch, 42 Me. 456; *In re* Middle District Bank, 1 Paige, 585; State v. Brobston (Ga.), 21 S. E. R. 146.

[3] Lincoln v. Fitch, 42 Me. 456.

[4] *In re* Hamilton (Oregon), 38 Pac. R. 1088.

[5] 71 N. Y. 396, 401.

The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties, as they may be determined by the judgment in the action.[1]

Section 226. **Title of Temporary Receiver — Pending Action to Dissolve a Partnership, or for Divorce.**— So where an action was brought to dissolve a partnership, and one of the co-partners was appointed receiver, *pendente lite*, of the partnership property, it was held that the appointment of the receiver wrought no change in the title to, or possession of, the property, and that therefore a policy of insurance thereon, containing a condition that a sale or transfer, or any change in the title or possession would invalidate the policy, was not thereby avoided.[2] And where a receiver is appointed over the personal estate, and of the rents and profits of the real estate, of a husband at the instance of, and for the benefit of, the wife, suing for a limited divorce, and to compel the payment, or security, of alimony granted by the court, the title to the realty does not vest in the receiver, who is entitled to the possession only, and who has no other powers than those specially conferred on him by the court. He is, moreover, not entitled to a judgment declaring void a conveyance made by the husband subsequently to his appointment, even though fraudulent, and made with an intent to conceal the property.[3]

In the absence of any statutory provision on the subject, real estate is vested in a receiver only by a conveyance to him, and the mere power to appoint a receiver *pendente lite*, to preserve property, does not include the power to authorize him to sell and convey real estate.[4]

Section 227. **Title of a Purchaser as Against the Receiver.** — Under the old chancery practice a purchaser from the defendant,

[1] Citing Skip v. Harwood, 2 Atk. 564; Gresley v. Addrally, 1 Swanst. 573; Thomas v. Bagstock, 4 Russ. 65; Bertrand v. Davies, 31 Beav. 436; Green v. Bostwick, 1 Sandf. Ch. 195; Swigerly v. Fox, 75 Pa. St. 112; Herring v. New York, Lake Erie & Western Railroad Co 105 N. Y. 340; Felter v. Maddox, 32 N. Y. S 292; Passavant v. Bowdoin, 15 N. Y. S. 8.

[2] Keeney v. Home Ins. Co. 71 N. Y. 396.

[3] Foster v. Townshend, 68 N. Y. 203. *Cf.* Parker v. Browning, 8 Paige, 388; Vincent v. Parker, 7 Id. 65; Iddings v. Bruen, 4 Sandf. Ch. 417; Fincke v. Funke, 25 Hun, 616; Glenn v. Busey, 8 Cent Rep. 288.

[4] St Louis & Sandoval, etc. Co. v. Sandoval, etc. Co. 111 Ill. 32.

with notice of a proceeding for the appointment of a receiver, took subject to the title of the receiver when appointed.[1] But this rule is not extended to a *bona fide* purchaser without notice, whether of real or personal property. Accordingly where an order was made containing an injunction restraining the debtors and others, until the final determination of the action, from transferring or selling certain shares of the capital stock of a company and, subsequently to the appointment of a receiver, the shares were sold in open market, by direction of pledgees, for less than their real value, it was held that the purchaser obtained a good title.[2] In Moak v. Coats,[3] the same principle was applied to a *bona fide* purchaser of real property, without notice, but before a conveyance to the receiver had been executed and put upon record. It has been held by the New York court of appeals, that where a receiver of the rents and profits only has been appointed, he does not take any title to the property, although entitled to the possession, and so that a transfer of the legal title, whether by grant or under a foreclosure, is not adverse to his possession, and is allowable.[4]

Section 228. **Title of an Assignee as Against the Receiver.** — Where, after the appointment of a receiver, an assignee in bankruptcy is appointed, it is held by the English court of chancery that the receiver's title and right of possession is in no wise impaired, the court saying that the appointment of a receiver "is a discretionary power exercised by this court with as great utility to the subject as any sort of authority that belongs to it, and is provisional only for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall be entitled, and does not at all affect the right."[5] The question has not arisen, so far as known, in this country precisely in this way, but it has been here decided that where an insolvent submits to the appointment of a receiver, at the instance of some of his creditors, he cannot, by a subsequent assignment, give preference to certain other creditors as to what may remain in the receiver's hands after the satisfaction of those at whose instance the receiver was appointed; the assets in such a case, it is said, are in the hands of a court of equity for equitable distribution.[6]

[1] Weed v. Snull, 3 Sandf. Ch. 273.

[2] Dudley v. Gould, 6 Hun, 97.

[3] 33 Barb. 498.

[4] Foster v. Townshend, 2 Abb. N. C. 29, 45. *Cf.* Shaw v. Glen, 37 N. J. Eq. 32, where it was held that the failure to record, in the proper county, a chattel mortgage, given in good faith, did not render it invalid as against the assignee of the mortgagor.

[5] Skip v. Harwood, 3 Atk. 564, per Lord Hardwicke.

[6] McGowan v. Myers, 66 Iowa, 99.

But an assignee for the benefit of creditors will not be compelled to pay the assets over to a receiver subsequently appointed upon a summary application to the court.[1]

Section 229. **Rights of an Adverse Claimant as Against the Receiver — The Remedy.**— As soon as a receiver obtains possession of property it is said to be *in custodia legis*, and the court will not allow it to be interfered with, upon the ground that a court with equity powers offers an adequate remedy for any mistake on the part of the receiver. The court will, upon a motion showing sufficient reason, make an order allowing the claimant to bring an action against the receiver, or may allow him to be examined in his own behalf. The latter is regarded as the more desirable practice, but where the claim is contested the former is often adopted.[2] Thus where a receiver was appointed of part of the rents and profits of real property, the remainder belonging to a stranger to the suit in the right of his wife, who made application to have that part paid over to him, in which application the wife came in and claimed it on the ground that she had commenced a suit for a divorce and a restoration of her property in the possession of her husband, the court refused to decide the question between them, but directed the receiver to pay the money into court to await such order or decree as might be made in the suit for divorce.[3] And generally where the receiver has in his possession property or funds which are claimed by persons not parties to the action, application may be made to the court, by petition or motion, for an order directing the receiver to deliver the property or fund to the rightful owner.[4] A court will not allow property which has come into the possession of its receiver to be reclaimed by an action of trespass.[5] Neither can an action of ejectment be brought against a receiver without leave of the court first obtained.[6] Nor is such an

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[1] Coleman v. Salisbury, 52 Ga. 470.

[2] Ames v. Trustees of Birkenhead Docks, 20 Beav. 332; Riggs v. Whitney, 15 Abb. Pr. 388; Russell v. East Anglian Ry. Co. 3 Mac. & G. 104; Noe v. Gibson, 7 Paige, 513; Evelyn v. Lewis, 3 Hare, 472; De Winton v. Mayor of Brecon, 28 Beav. 200; *Ex parte* Cohrane, L. R., 20 Eq. 282; Brooks v. Greathed, 1 Jac. & Walk. 176; Vincent v. Parker, 7 Paige, 65; Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792; Spinning v. Ohio Life Insurance & Trust Co. 2 Disney, 368; Brien v. Paul, 8 Tenn. Chan. 357. *Cf.* Skinner v. Maxwell, 68 N. C. 400. And see, further, *dicta* in Parker v. Browning, 8 Paige, 388 (per Walworth Chancellor).

[3] Vincent v. Parker, 7 Paige, 65.

[4] Smith v. Dayton (Io.), 62 N. W. R. 650; Riggs v. Whitney, 15 Abb. Pr. 388. *Cf.* Evelyn v. Lewis, 3 Hare, 472.

[5] *Ex parte* Cochrane, L. R. 20 Eq. 282. *In re* Day, 34 Wis. 638.

[6] Angel v. Smith, 9 Ves. 335.

action permitted to be prosecuted in another court, but the remedy must be sought against the receiver in the action in which he is appointed.[1] A court will even declare void a sale made under an execution issued on a judgment obtained before the appointment of a receiver where the land was levied on subsequently thereto.[2] And it has been held in New York that the fact that a receiver has been discharged is no answer to a motion for leave to bring an action against him for the possession of certain property, where the claimants had no notice of the motion for his discharge, although the receiver knew of their claim; and an order denying such motion is appealable.[3] So, also, where a receiver of the effects of an insolvent auctioneer was appointed, and it appeared that the auctioneer had been accustomed to deposit the proceeds of sales made by him, in the course of his business, in a bank to his own credit, and in a particular instance had sold goods for a party and, with his knowledge and consent, had so deposited the moneys received at the sale, and after the appointment of the receiver and notice thereof to the bank, had drawn a check in favor of the vendor for the amount due him, giving him at the same time an assignment of the deposit to that amount, it was held that the vendor obtained thereby no right to the deposit and no right of action thereby against the bank.[4]

Section 230. **Interference with Receiver's Possession — Receiver's Remedy by Injunction.**—Where an attempt is made to disturb or interfere with the possession of property by a receiver, without leave to proceed first obtained from the court by which the receiver is appointed, the remedy of the receiver is by an injunction to restrain the interference. There may also, in general, be a proceeding to punish for contempt.[5] Accordingly the court may interfere by an injunction in respect of the exercise by a railway company of the right of eminent domain granted to it by special charter, the property over which the right is proposed to be exercised being in the hands of a receiver.[6]

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[1] Fort Wayne, M. & C. R. R. Co. v. Mellet, 92 Ind. 585.

[2] Wiswall v. Sampson, 14 How. (U. S.) 52.

[3] Miller v. Loeb, 64 Barb. 454.

[4] Levy v. Cavanagh, 2 Bosw. (N. Y.) 100.

[5] Fink v. Rundle, 10 Beav. 318; Try v. Try, 13 Id. 422; Johnes v. Claughton, Jac. 573; Attorney-General v. St. Cross Hospital, 18 Beav. 601; Noe v. Gibson, 7 Paige, 513. See also *infra* as to proceedings for contempt.

[6] Fink v. Rundle, *supra*. See further the chapter on Injunctions, *infra*.

Section 231. **Rule as to Property in the Possession of Third Persons Under Claim of Title.**—Where one has obtained possession of property, under color of title, which the receiver claims as belonging to the defendant, the rule is that the court which appointed the receiver will not undertake to determine the rights of such a claimant upon a motion to compel him to deliver over the property, but will oblige the receiver to have recourse to an action at law to recover possession. The court will, in general, entertain such an application, on motion supported by affidavits, only where it clearly appears that the adverse possession began subsequently to the commencement of the action, and is, therefore, subject to the decree, or order, which has been made; or where the person holding the property has no legal right; and, as a rule, wherever the testimony is conflicting, and there is a reasonable ground for difference of opinion as to which is entitled to possession of the property, the court will not assume to try the title by hearing a motion for a writ of assistance.[1] There are circumstances, however, under which third parties will be ordered to deliver property to the receiver.[2] And they may be ordered to appear and be examined as to property which they refuse to deliver to the receiver,[3] and to show cause why he should not deliver to the receiver the property claimed by him.

And, in a case in New York where the court made an order allowing suit to be brought against its receiver and his subordinates, for an alleged trespass by the receiver in forcibly entering a store alleged to belong to, and to be in the possession of, the petitioners, and for taking property therefrom upon the claim that he was entitled to it, Chancellor Walworth, in affirming the order of the vice-chancellor, said that, "in cases of this description it is more in accordance with the spirit of our institutions to permit the parties claiming to proceed at law where they may have the benefit of a jury trial, than to attempt to settle their right by a reference to a master. * * * And if the property is in the possession of a third person who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and

[1] Gelpeke v. Milwaukee & Horicon R. R. Co. 11 Wis. 454, where a receiver in an action in a state court, made a motion for a writ of assistance to obtain possession of property from a receiver appointed by the United States district court prior to his own appointment.

[2] Tolleson v. Greene, 83 Ga. 499; Charten v. Chandler, 21 S. W. R. 518.

[3] Mathusheck Piano Manufacturing Co. v. Pearce, 29 N. Y. S. 781; Sullivan v. Colby, 71 Fed. R. 460.

apply to have the receivership extended to the property in his hands; so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt, if it is not obeyed. But where the property is in the possession of a third person, under a claim of title, the court will not protect the officer who attempts by violence to obtain possession, any further than the law will protect him; his right to take possession of property of which he has been appointed receiver being unquestioned."[1]

Section 232. **Miscellaneous Limitations Upon the Title of the Receiver—Letters Patent.**— It is now generally held that a receiver, who obtains possession of negotiable paper, cannot claim to do so as in the regular course of business, and that he is not, therefore, a *bona fide* holder for value.[2]

Where a receiver was discharged after the plaintiff's claim in the suit in which he was appointed had been satisfied with the consent of the court, by a note payable to the defendant company and endorsed by it, which note, however, remained in the possession of its president as agent for the real owner, and subsequently, in another action, a new receiver was appointed who brought suit against the president for the conversion of the company's assets, it was held that the new receiver had no title to the note, and no right in it except to question the validity of the transaction and seek a recovery from the true owner, and that no cause of action existed against the president.[3]

But where two persons who were each the assignee of one-sixth of a patent right, made an agreement with the owners of the residue by which they, for a royalty, secured the exclusive right to manufacture articles under the patent, and they subsequently assigned and transferred the right to a corporation, and later a receiver was appointed of the property of the corporation for the purpose of dissolution, and he was permitted to continue and carry on the business of the corporation, and one of the original assignees procured, for a royalty, a license to manufacture the article, which he proceeded to do, he was, at the suit of the receiver, held guilty of contempt.[4]

It has been decided[5] that the receiver of a corporation, appointed

[1] Parker v. Browning, 8 Paige, 388, 390.

[2] Daniel's Negotiable Inst. 781; Briggs v. Merrill, 58 Barb. 389.

[3] Prentiss v. Nichols, 1 Cent. Rep. 278 (N. Y. Ct. of App.)

[4] *In re* Woven Tape Skirt Co. 12 Hun, 111.

[5] Dick v. Struthers, 25 Fed. Rep. 108.

under the laws of Pennsylvania, is a mere custodian of its property and, by virtue of his appointment, has no title to letters patent owned by it, and cannot maintain an action thereon in his own name without leave of court first obtained.

A receiver cannot convey the legal title to a patent unless the owner joins, because of the federal statute which requires an assignment in writing signed by the owner.[1] This rule, however, does not apply to the transfer of a mere equitable title.[2]

Section 233. **Effect of the Death of the Judgment Debtor Pending Proceedings Supplementary to Execution.**—It has been held in North Carolina, in the statutory proceedings supplementary to execution, that if the debtor die before any receiver be actually appointed, that he can, upon a subsequent appointment, obtain no title to the debtor's effects, but that they must be distributed according to law as the statute provides in case of the decease of any person owing debts.[3]

Section 234. **Statute of Limitations.**—As a general rule, the mere appointment of a receiver to take charge of property in dispute, will not suspend the operation of the statute of limitations, nor will it interrupt the possession of a stranger so as in effect to prevent the statute conferring title on him; nor will it suspend the running of the statute against a stranger. But where the receiver is appointed to take charge of an estate for the purpose of administration, as for instance, the settlement of the affairs of a partnership and the payment of the firm debts, the suit being substantially for the benefit of all the creditors, in analogy to an ordinary creditor's bill, the appointment will suspend the running of the statute, and lapse of time before instituting a proceeding against the receiver in the court by which he was appointed, will be regarded merely a question of laches, and the court will, without reference to the statute, consider the question whether the creditor has been guilty of an unreasonable delay in commencing the prosecution of his claim.[4]

The statute of limitations runs in favor of a receiver, and he may successfully plead the statute.[5] In general it is the rule that the appointment of a receiver does not, in any way, affect the running

[1] Gordon v. Anthony, 16 Blatchf. 234.

[2] Adams v. Howard, 22 Fed. Rep. 656.

[3] Rankin v. Minor, 72 N. C. 424.

[4] Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 555.

[5] Memphis & Charleston Railroad Co. v. Holchner, 14 U. S. C. C. App. 469.

of the statute.[1] Thus, for example, the appointment of a receiver of the assets of a bank will not set the statute in motion against a certificate of deposit issued by it.[2] The receiver is to be regarded a trustee for the parties in interest, and the rule in chancery as to the running of the statute in favor of a trustee, in respect to moneys due but not accounted for, will usually be applicable.[3] The receiver, however, does not sustain such a relation to the parties that a payment made by him in the course of his receivership, will be regarded such part payment, or acknowledgement, as will operate to take the demand out of the statute.[4] But where an injunction was obtained by the administrator of a deceased partner, restraining the surviving members of the firm from collecting any of the assets or property of the firm, and a receiver of such assets was appointed, although the injunction did not refer in terms to any particular demand, yet, as the bringing of an action by the surviving partners would have been in disregard of the injunction, the running of the statute in favor of the debtor will be suspended during the time the injunction continues in force. It will be observed that, in this case, the receiver acquired no title to the demand, and had no power to sue for the recovery of it, all other persons being equally restrained from so doing.[5]

It has been held in England that the appointment of a receiver will prevent the statute from running in favor of a stranger to the suit as far as the court of equity is concerned.[6]

II.

Of the Receiver's Possession.

Section 235. **Of the Receiver's Possession in General.** — It has already appeared that the object of appointing a receiver is not to divest a rightful owner of the title to the property involved, but to place it, *pendente lite*, in such hands that, upon a final decree, or judgment, in the controversy, it may be applied to the enforcement of that decree or judgment; that is to say, the object of the receivership is to put the property in the hands of an indifferent person, to be preserved pending the litigation concerning it, and sub-

[1] Harrison v. Dignan, 1 Con. & Law. (Ir. Chan.) 876; Kyme v. Dignan, 4 Ir. Eq. 562.

[2] Riddle v. First National Bank, 27 Fed. Rep. 503.

[3] Seagram v. Tuck, 18 Ch. D. 296.

[4] Whiteley v. Lowe, 2 De G. & J. 704; affirming s. c., 25 Beav. 421.

[5] Fincke v. Funke, 25 Hun, 616.

[6] Wrixon v. Vize, 3 Dru. & War. (Ir. Chan.) 104.

ject to the final order of the court. The receiver must, in general, be held to have title, otherwise he will not be able to execute his trust, which may necessitate a transfer and a revesting of the original title. The possession of the receiver is that of the court of which he is the ministerial officer. Thus it is that, inasmuch as the receiver is merely an officer of the court appointing him, property in his possession is said to be in the custody of the law.[1] His possession, as an officer of the court of chancery, has been likened to that of the sheriff as an officer of a court of law, when he has taken possession of the property under an execution or attachment.[2] And it is said to be immaterial in this respect that the receiver appointed declines to act, the property being notwithstanding in the custody of the law.[3]

The change of possession from a temporary to a permanent receiver does not at any time take the property out of the possession of the law.[4]

Section 236. **Receiver's Possession is Not Technically Adverse to that of Either Party.**—The appointment of the receiver is not such as to oust any party of his right, that is, it is not adverse to either party to the action, the court taking possession solely for the sake of preserving, or conserving, the property, in order to render efficacious the final determination of the litigation.[5] It has been said, by way of illustration, that when a receiver has been appointed and takes possession of real estate, the tenants thereof, on attorning to him, become the tenants of the court.[6] But, notwithstanding this view, the rights and liabilities of the original parties, in respect of the property, do not, as of course, remain in all respects as they were before the receiver was appointed. The receiver's possession of the property is of such a nature as to relieve the previous holder of further responsibility in reference to it. So, if the property consist of slaves who are emancipated by the state after the receiver has taken possession, the previous owner is no longer liable for their value.[7] And where property in the receiver's

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[1] De Visser v. Blackstone, 6 Blatchf. 235; Robinson v. Atlantic & Great Western Ry. Co. 66 Pa. St. 160; Angel v. Smith, 9 Ves. 335; Ohio, etc., R. R. Co. v. Fitch, 20 Ind. 498; Ellicott v. Warford, 4 Md. 80: Albany City Bank v. Schermerhorn, 9 Paige, 372. *Cf.* Covell v. Heyman, 111 U. S. 176.

[2] *In re* Merchants' Insurance Co. 8 Biss. 165, (per Blodgett, J.)

[3] Skinner v. Maxwell, 68 N. C. 400.

[4] Mosher v. Order of Iron Hall, 84 N. Y. S. 817.

[5] Ellicott v. Warford, 4 Md. 80; Mays v. Rose, Freeman (Miss.) 703.

[6] Angel v. Smith, 9 Ves. 335.

[7] Lee v. Cone, 4 Coldw. (Tenn.) 392.

hands has been stolen, an indictment averring ownership in the receiver is not defective.[1]

Section 237. **How Far the Possession of the Receiver is That of the Party Who Ultimately Recovers.**—It is sometimes stated that the possession of a receiver is that of the party who is ultimately successful in the litigation, and that his title will relate back to the appointment.[2] But that this is not sound as a general principle is clear when the nature of the actions in which receivers are appointed, are considered; these are, in general of two kinds, the one to establish a title to certain property, as in a mortgage foreclosure, partition suits and the like; the other to establish a debt or other claim, or for a dissolution of a corporation or partnership, and to have the property of the debtor, partnership or corporation collected, reduced to available assets and distributed. In the first class the proposition is substantially correct, in the second it is not at all true. Thus Lord Hargreave, in the case of *In re* Butler's estate,[3] said: "The general proposition is, that the possession of the receiver is that of all the parties to the suit, according to their titles. As between the owner and incumbrancers, it is for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner whose possession has been displaced, and a third party, it is the possession of the former. The receiver is in fact his agent; all the rents are applied to his use, either by paying his debts, or paramount charges, or by being handed over to him."

If, in an action to recover possession, a receiver be appointed, and the plaintiff finally prevail in establishing a title, such title will date back to the appointment and the receiver's possession will have been that of the plaintiff.[4] But if, upon the other hand, the defendant prevail, the appointment of a receiver, although necessary for protecting the interests of all the parties, will not defeat a claim for damages;[5] and if a receiver of mortgaged premises remain in possession after an order has been made directing him to pay the proceeds in his hands to the mortgagee and to render an account, his possession thereafter will be regarded as that of the mortgagee.[6]

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[1] State v. Rivers, 60 Iowa, 381.

[2] Beverley v. Brooke, 4 Gratt. 187, 213; Sharp v. Carter, 3 P. Wms. 375; Ellicott v. Warford, 4 Md. 80.

[3] 13 Ir. Ch. (N. S.) 456.

[4] Sharp v. Carter, 3 P. Wms. 375.

[5] Sturgis v. Knapp, 33 Vt. 486.

[6] Harlock v. Smith, 11 L. J. (N. S.) Ch. 157; s. c., 6 Jur. 478.

Section 238. **Generally of Interference with Receivers—Possession by Individuals and Other Courts.** No rule is better settled than that where a receiver has been appointed his possession is that of the court and cannot be disturbed without leave of the court; and if any person, without leave, intentionally interferes with such a possession he necessarily commits a contempt of court, and is liable to punishment therefor.[1]

Interference by an officer in a proceeding to enforce the collection of a tax will not be tolerated.[2]

One, signing himself as chairman, sent the following notice to the different foremen of the shops of the Wabash Ry. Co. during a strike, the railroad being at that time in possession of a receiver appointed by the federal court: "Foreman: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees. But in no case are you to consider this an intimidation." Held that this was an unlawful interference with the management of the road by the receiver, and a contempt of court, for which the writer should be punished.[3]

Taking property from the possession of the receiver without leave of the court is a contempt and punishable as such.[4] The claimant, though his title plainly appears to be superior, must first ask leave of the court before he takes any steps to secure possession of the property.[5]

In an English case Lord Romilly said: "I apprehend this is clear: that the court never allows any person to interfere, either with money or property in the hands of its receiver, without its leave, whether it is done by the consent or submission of the receiver, or by compulsory process against him. The court is obliged to keep a strict hand over property in the hands of a receiver, or which, by virtue of the order of the court, may come into his hands, in order to preserve entire jurisdiction over the whole matter, and to do that which is just in the cause between the parties."[6]

Where a receiver was in possession of property pending a suit involving the right to its possession merely, an action to redeem from a mortgagee, it was held that a sale of the property under the process of another court was not an interference with the posses-

[1] *In re* Tyler, 149 U. S. 164; Abbey v. International and Great Western Railway Co. 5 Tex. Civ. App. 261; Walker v. Taylor Commission Co. 51 Ark. 1.

[2] *In re* Tyler, 149 N. S. 164.

[3] *In re* Wabash Railway Co 24 Fed. R., Krekel, D. J.

[4] Moore v. Mercer Wire Co. 15 At. R. 737.

[5] Id.

[6] De Winton v. Mayor, 28 Beav. 300.

sion of the receiver;[1] but the court declined to direct a sale out of deference to the dicta of Mr. Justice Nelson in Wiswall v. Sampson.[2]

A receiver operating a railroad under orders of the federal court transported a cask of liquor into South Carolina, which was seized by a constable under what is known as the Dispensary Act. The receiver applied to the court which appointed him for an attachment for contempt against the constable. The court adjudged the constable guilty of contempt, ordered him to be imprisoned until he returned the property, and when that should be done that he be imprisoned for a further period of three months, and until he should pay the costs. On application for a writ of *habeas corpus* it was held that the circuit court had jurisdiction; that the action of the court in the contempt proceeding was not open to review in the *habeas corpus* proceeding, and that possession of property by the judicial department whether federal or state cannot be arbitrarily encroached upon without violating the fundamental principle which requires co-ordinate departments to refrain from interference with the independence of each other.[3]

An injunction will issue to restrain the seizure of property in the possession of a receiver under a writ of execution issued on a judgment rendered after the appointment.[4] Leave of the court must be first obtained; and the prevailing rule is that it is immaterial whether the judgment be rendered before or after the appointment. The appointment and the receiver's possession remove the property from the reach of all process.[5] That the judgment creditor had no knowledge of the receiver's appointment and possession, would avail in a contempt proceeding, but would not give validity to the seizure.[6]

Both federal and state courts uniformly adhere to the rule that, after a court of competent jurisdiction has taken property into its custody through its receiver, no other court has the right to interfere with the power of the former court to control and dispose of it.[7] If there be prior existing liens, they are not affected by the

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[1] Hickox v. Holladay, 29 Fed. R. 226.

[2] 14 How. 52.

[3] *In re* Swan, 150 U. S. 637; s. c., 14 S. C. R. 225; opinion by Mr. Chief Justice Fuller.

[4] Gardner v. Caldwell (Mont.), 40 Pac. R. 590.

[5] Gardner v. Caldwell, 40 Pac. R. 590; Regenstein v. Pearlstein, 30 S. C. 192.

[6] Gardner v. Caldwell, 40 Pac. R, 590.

[7] Hammond v. Tarver (Tex. Civ. App.), 31 S. W. R. 841.

appointment of the receiver and his possession, except as to the manner of enforcing them.[1]

No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized by the court appointing the receiver. The payment of the judgment is necessarily under the control of the latter court.[2]

The court appointing a receiver has the power as incident to the power of appointment to prevent any interference with the assets of the insolvent by individual creditors or others, in order to preserve the fund for distribution. "An order of that nature being for the protection of the fund which the court has in its possession through its receiver, is not subject to every provision of the statute and of the rules of the court which apply to injunction orders granted upon the application of a party for the protection of his individual rights.[3]

Section 239. **Interference with the Receiver's Possession by a Third Party.**— This point has already been partly considered under the discussion of the effect of levy under execution in an action at law;[4] and it was there said that the equity courts are in general impatient of any interference with a receiver's possession, not only after the property is finally reduced to possession, but also in many cases where the receiver has been appointed, but has not actually taken possession.[5] It will not be necessary, therefore, to do more here than to refer by way of illustration to a few cases where an attempt was made to interfere with the possession of the receiver, or where courts of equity have ruled precisely upon the question in hand.

When the receiver takes actual possession of real property, it is exempt from levy and sale under an execution issued on a judgment recovered subsequently to the appointment.[6] But a purchaser will acquire no title to property under an execution sale made without leave of the court, where the lien of the judgment was not obtained until after the receiver was appointed.[7] And firm assets in the possession of a receiver for the benefit of the firm creditors, are not

[1] Dann Manufacturing Co. v. Parkhurst, 125 Ind. 317.

[2] Dillingham v. Russell, 73 Tex. 47.

[3] Phœnix Foundry & Machine Co. v. North River Construction Co. 33 Hun, 156.

[4] See sections 220, 227.

[5] As, for example, in Skinner v. Maxwell, 68 N. C. 400, where the receiver declined to act.

[6] Edwards v. Norton, 55 Texas, 405; Gardner v. Caldwell, 40 Pac. R. 590; approving text.

[7] Dugger v. Collins, 69 Ala. 324.

subject to levy under an execution recovered against the partners subsequently to the appointment;[1] but the rule is otherwise if the judgment lien was earlier than the appointment,[2] and in Missouri, such property is exempt from seizure and sale for unpaid taxes.[3] If a sheriff levy on property in the hands of a receiver and in consequence thereof an action at law is brought against him for damages, equity will not aid him by an injunction.[4]

If one claim property in possession of a receiver he should apply to the court for redress, and not commit trespass.[5]

Courts of equity incline to carry the rule, not to suffer an interference with the possession of property by a receiver, to its farthest limits. Thus they will interpose, in behalf of a receiver, as against persons attempting to make use of an alleged easement which has been abandoned for a number of years. So where a right of common pasturage was claimed, and, the receiver having impounded the cattle, their owner brought an action of replevin to recover them, the court enjoined him from claiming the right of common, and from continuing his action, but allowed him to establish the right in the usual way by examination, *pro interesse suo*.[6]

The proper remedy for a judgment creditor who desires to subject property in the hands of a receiver is the same as that of one who claims that the receiver has taken into his possession property which belongs to him and not to the defendant.[7] He should obtain leave of the court and bring his action against the receiver in conformity with the local practice.

Section 240. **Interference by Another Court.**— There is no less disposition on the part of courts of chancery to resent the interference of another court in respect of the possession of the receiver or of the free discharge of his duties. The interference of another court will be as promptly resisted as that of a stranger to the suit. The principle that property in the hands of a receiver is in *custodia legis*, and that the receiver is a mere officer of the court, deriving whatever power he possesses entirely from the order by which he is appointed, prevents him from making any payments of money with-

[1] Jackson v. Lahee, 114 Ill. 287.

[2] Chautauqua Co. Bank v. Risley, 19 N. Y. 369.

[3] Central Trust Co. v. Wabash, St. Louis, etc., R. R. Co. 26 Fed. Rep. 11.

[4] Try v. Try, 13 Beav. 422.

[5] Woodburn v. Smith (Ga.), 22 S. E. R. 964.

[6] Johnes v. Claughton, Jac. 573.

[7] Section 229, *supra*, and see more particularly Dugger v. Collins, 69 Ala. 324; Robinson v. Atlantic & Great Western Ry. Co. 66 Pa. St. 160; Riggs v. Whitney, 15 Abb. Pr. 388.

out an order of the court; and if he make a payment, even though under the compulsory process of another court, such payment will not be allowed by the court by which he was appointed on the settlement of his accounts. The court adopts this extension of the principle in order to preserve entire its jurisdiction over the subject-matter.[1]

In the English case just cited Lord Romilly, in delivering the opinion, said: "It is always to be remembered that the receiver in this case would never have got a penny except by the order of the court enabling him to receive it, and entitling him to give a good discharge to the person who paid it, and consequently, it is strictly money belonging to the court of chancery, and the receiver can only discharge himself by paying it in obedience to the direction and order of that court."[2] This is a concise statement of the law applicable as well in the courts of this country as in England.

"That property in the hands of a receiver by virtue of an order of one court cannot be sold under process from another court, is a proposition of law too well established to be for a moment called in question."[3]

Section 241. **Interference Where the Appointment is Irregular or Erroneous.**—The effect of an irregular or erroneous appointment has already been considered with respect to the effect of such an appointment upon the title of the receiver.[4] As has been shown, it is the rule that mere irregularity or error in appointment of the receiver is no ground for interference with the receiver's title to the property. The same principle extends to the possession of the receiver, and all the courts are careful not to allow the validity of their proceedings to be called in question in a collateral matter, even though the suit in which the question arises grows out of the same controversy. It is, as a general rule of law, held to be necessary to an orderly and proper procedure in courts of justice that the attention of the court be not diverted from the actual controversy in hand, and that all proceedings stand until set aside in a direct proceeding for that express purpose.[5] The courts of equity are, accordingly, open to parties who have cause of action against

[1] De Winton v. Mayor of Brecon, 28 Beav. 200. *Cf.* People's Bank v. Calhoun, 102 U. S. 256.

[2] De Winton v. Mayor of Brecon, 28 Beav. 200.

[3] St. Louis, Arkansas & Texas Railroad Co. v. Whitaker, 5 S. W. R. 448.

[4] Section 215, *supra*.

[5] Ames v. Trustees of Birkenhead Docks, 20 Beav. 332; Russell v. East Anglian Ry. Co. 3 Mac. & G. 104; Cook v. Citizen's National Bank, 73 Ind. 256.

their officers, and appropriate remedies are provided. Upon application such a court will, in general, allow an action against its officer to determine his title, or for his examination *pro interesse suo.*

Section 242. **Garnishment — Receiver Not Subject to — Exception.**—A court having by the appointment of a receiver become the custodian of property in litigation, will not suffer an interference therewith by any procedings in any other court. Neither will a court of equity become a party to an action pending in another court concerning property in its possession. A receiver, therefore, is not, in the absence of statutory provisions, subject to garnishment, attachment or trustee process.[1] Accordingly property, in the hands of a receiver of the assets of an insolvent partnership, cannot be reached by garnishment to satisfy a judgment recovered subsequently to the appointment.[2]

And, in New York, where supplementary proceedings were instituted on a judgment and an order was procured for the examination of the receiver of a New Jersey railway corporation appointed in New Jersey, and it was discovered that the corporation was indebted to the judgment debtor for wages, the New York court refused to direct the receiver to pay over such indebtedness, although it appeared that the New Jersey court of chancery had authorized him to pay the employees of the corporation in installments, as the earnings of the road might permit, and that a large portion of the moneys due the debtor were earned and due for more than sixty days prior to the issuing of the order. In taking this ground, the court said: "It is clearly against the policy of the law to justify such an irregular and vexatious interference with the orderly and customary method of adjusting and winding up the affairs of a corporation, after a receiver has been appointed. When a court of competent authority has assumed control in such a case, and possesses a jurisdiction adequate to grant proper relief to all parties interested, such court should be applied to instead of instituting

[1] Gouverneur v. Warner, 2 Sandf. Super. Ct. 624; Commonwealth v. Hide and Leather Insurance Co. 119 Mass. 155; Richards v. People, 81 Ill. 551; Cooke v. Town of Orange, 48 Conn. 401; Blake Crusher Co. v. New Haven, 46 Id. 473; Field v. Jones, 11 Ga. 413; Killmer v. Hobart, 8 Abb. N. C. 426; Kneeland on Attachment, § 418; Borer v. Chapman, 7 U. S. Sup. Ct. Rep. 842 (1887); Central Trust Co. of New York v. Chattanooga, Rome & Columbus Railroad Co. 68 Fed. R. 685; Jackson v. Lahee, 114 Ill. 287; Blum v. Van Vechten (Wis.), 66 N. W. R. 507. A statute prohibiting garnishment of "public officer," held not to include receiver. Cohnen v. Black, 63 N. W. R. 641.

[2] Jackson v. Lahee, 114 Ill. 287; McGowan v. Myers, 66 Iowa, 99; Taylor v. Gillean, 23 Texas, 508.

under the laws of Pennsylvania, is a mere custodian of its property and, by virtue of his appointment, has no title to letters patent owned by it, and cannot maintain an action thereon in his own name without leave of court first obtained.

A receiver cannot convey the legal title to a patent unless the owner joins, because of the federal statute which requires an assignment in writing signed by the owner.[1] This rule, however, does not apply to the transfer of a mere equitable title.[2]

Section 233. **Effect of the Death of the Judgment Debtor Pending Proceedings Supplementary to Execution.**—It has been held in North Carolina, in the statutory proceedings supplementary to execution, that if the debtor die before any receiver be actually appointed, that he can, upon a subsequent appointment, obtain no title to the debtor's effects, but that they must be distributed according to law as the statute provides in case of the decease of any person owing debts.[3]

Section 234. **Statute of Limitations.**—As a general rule, the mere appointment of a receiver to take charge of property in dispute, will not suspend the operation of the statute of limitations, nor will it interrupt the possession of a stranger so as in effect to prevent the statute conferring title on him; nor will it suspend the running of the statute against a stranger. But where the receiver is appointed to take charge of an estate for the purpose of administration, as for instance, the settlement of the affairs of a partnership and the payment of the firm debts, the suit being substantially for the benefit of all the creditors, in analogy to an ordinary creditor's bill, the appointment will suspend the running of the statute, and lapse of time before instituting a proceeding against the receiver in the court by which he was appointed, will be regarded merely a question of laches, and the court will, without reference to the statute, consider the question whether the creditor has been guilty of an unreasonable delay in commencing the prosecution of his claim.[4]

The statute of limitations runs in favor of a receiver, and he may successfully plead the statute.[5] In general it is the rule that the appointment of a receiver does not, in any way, affect the running

[1] Gordon v. Anthony, 16 Blatchf. 234.

[2] Adams v. Howard, 22 Fed. Rep. 656.

[3] Rankin v. Minor, 72 N. C. 424.

[4] Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 555.

[5] Memphis & Charleston Railroad Co. v. Holchner, 14 U. S. C. C. App. 469.

of the statute.[1] Thus, for example, the appointment of a receiver of the assets of a bank will not set the statute in motion against a certificate of deposit issued by it.[2] The receiver is to be regarded a trustee for the parties in interest, and the rule in chancery as to the running of the statute in favor of a trustee, in respect to moneys due but not accounted for, will usually be applicable.[3] The receiver, however, does not sustain such a relation to the parties that a payment made by him in the course of his receivership, will be regarded such part payment, or acknowledgement, as will operate to take the demand out of the statute.[4] But where an injunction was obtained by the administrator of a deceased partner, restraining the surviving members of the firm from collecting any of the assets or property of the firm, and a receiver of such assets was appointed, although the injunction did not refer in terms to any particular demand, yet, as the bringing of an action by the surviving partners would have been in disregard of the injunction, the running of the statute in favor of the debtor will be suspended during the time the injunction continues in force. It will be observed that, in this case, the receiver acquired no title to the demand, and had no power to sue for the recovery of it, all other persons being equally restrained from so doing.[5]

It has been held in England that the appointment of a receiver will prevent the statute from running in favor of a stranger to the suit as far as the court of equity is concerned.[6]

II.

Of the Receiver's Possession.

Section 235. **Of the Receiver's Possession in General.** — It has already appeared that the object of appointing a receiver is not to divest a rightful owner of the title to the property involved, but to place it, *pendente lite*, in such hands that, upon a final decree, or judgment, in the controversy, it may be applied to the enforcement of that decree or judgment; that is to say, the object of the receivership is to put the property in the hands of an indifferent person, to be preserved pending the litigation concerning it, and sub-

[1] Harrison v. Dignan, 1 Con. & Law. (Ir. Chan.) 876; Kyme v. Dignan, 4 Ir. Eq. 562.

[2] Riddle v. First National Bank, 27 Fed. Rep. 503.

[3] Seagram v. Tuck, 18 Ch. D. 296.

[4] Whiteley v. Lowe, 2 De G. & J. 704; affirming s. c., 25 Beav. 421.

[5] Fincke v. Funke, 25 Hun, 616.

[6] Wrixon v. Vize, 3 Dru. & War. (Ir. Chan.) 104.

parties to the record. The surrender of the property to a receiver under order of the court is enforceable by attachment process.[1]

The court will protect its receiver in the possession, use and management of the property, and privileges and franchises pertaining thereto; and will restrain any act of interference therewith.[2]

Section 245. **Certain Limitations Upon the Foregoing Rule.**—While the courts are, in general, inclined to insist that the receiver should be allowed summarily to take possession of all the property subject to the receivership, and to that end to aid the receiver as the circumstances may require, they will still proceed with a due regard to the rights of third parties in and to the property in dispute. The method of obtaining an order for the delivery of the property to the receiver, involving to some extent, a trial of the issues on affidavits, does not afford an adequate opportunity for the consideration of the claims of third persons to the property. The court, therefore, will not, as a rule, on a motion interfere with the possession of one holding under claim of title, but will direct the receiver to institute an action at law to try the title.[3] This rule applies to the case of a purchaser, in good faith and without notice, who has obtained possession subsequently to the appointment of the receiver.[4] And where the property is in the possession of a third person under an assignment alleged to be fraudulent, the court will not order the defendant to deliver up the property without the consent of the assignee, but the receivership should be extended to him.[5]

An assignee for the benefit of creditors will not be obliged, upon a summary application to the court, to pay over to a receiver, subsequently appointed, funds which he has reduced to his possession.[6] And where the property of a defendant had been sold under execution, but he still had the use of it, and it remained under the control of an agent of the purchaser—the mother of defendant, who had lived with him—and the purchaser had the power, at any moment, to step in and assume actual possession, the delivery of such property to a receiver, subsequently appointed, will not be ordered without first making the purchaser a party to

[1] Miller v. Jones, 39 Ill. 54.

[2] Fidelity Trust & Safety Vault Co. v. Mobile Street Railway Co. 53 Fed. R. 687.

[3] See § 231 *supra*; Cassilear v. Simmons, 8 Paige, 273; McCombs v. Merryhew, 40 Mich. 721.

[4] See § 229 *supra*; Levi v. Karrick, 13 Iowa, 344.

[5] Cassilear v. Simmons, 8 Paige, 273; Parker v. Browning, Id. 389.

[6] Coleman v. Salisbury, 52 Ga. 470.

the suit and giving him an opportunity to defend his title.[1] The question of fraudulent intent in respect of the possession of either the defendant or others, is a question for the jury.[2]

Section 246. **Interference Resulting from Conflict of Receiverships.**—As a general rule the appointment of more than one receiver, whether by the same or a different court, except in the case of joint receivers, is not allowable. Two receivers can not both have separate titles to and possession of the same property, each being appointed in a distinct and independent proceeding, and both having, by the terms of their appointment, entire control over the assets of the defendant. In case of such conflicting appointments, the courts will not inquire into the priority of appointment, but should only consider which suit was first commenced, and, if necessary, take into consideration fractions of a day.[3] The question which of the several receivers first obtains actual possession of the assets will not enter into the determination of the matter.[4] Where the decision of the court is in favor of the receiver first appointed, it will order the second one to surrender to him the assets of which he may have obtained possession.[5]

And where an order of reference is made directing the master to appoint a receiver and an injunction is issued, and an appeal is taken from such order, a stay of proceedings before the referee being obtained during the pendency of the appeal, and on the appeal the order of reference is affirmed and the appointment is made thereunder, the receiver so appointed will take precedence over one appointed during the appeal, and the court will require all

[1] Robeson v. Ford, 3 Edw Ch. 441.

[2] Robeson v. Ford, 3 Edw. Ch. 441; Smith v. Acker, 23 Wend. 653; Edgell v Hart, 9 N. Y. 213.

[3] In the original edition the text reads thus: "In case of such conflicting appointments the court will inquire into the priority of appointments, and, if necessary, will take into consideration fractions of a day." This statement was taken by the federal court in the case of East Tennessee, Virginia & Georgia R. R. Co. v. Atlanta & Florida R. R. Co. 49 Fed. R. 608, as authority for declaring the receiver first appointed and first taking possession of the property as having rights superior to a receiver subsequently appointed and attempting to take possession of the property, though in a suit first instituted. This subject we have discussed at length in chapter 3, where we have asserted and attempted to show that reason and the current of authority are in favor of the proposition which gives to the receiver appointed in the litigation first commenced rights superior to those of a receiver appointed in a subsequent suit, though the latter be first appointed and takes possession of the property.

[4] People v. Central City Bank, 53 Barb. 412; s. c., 35 How. Pr. 428, where one receiver was appointed at 11 a. m., and the other at 4 p m., the latter having obtained possession of the assets first. *Cf.* Howell v. Ripley, 10 Paige, 43.

[5] People v. Central City Bank, *supra*.

[illegible] have been acquired by the second receiver to be [illegible]. In general, moreover, a receiver subsequently appointed will not be allowed, except with leave of the court, to interfere with the possession of the first.[2]

In the case of a creditor's suit, under the rules of chancery practice in New York, where more than one suit is pending against the same defendant, the receiver, appointed in one suit, may, if he consent and give such additional security as the court may require, be appointed in the other suits. If he have accepted the trust in one suit he has, indeed, no right to decline it in another, and where the suits are all commenced before the chancellor, or before the same vice-chancellor, so as to give the same judge of the court jurisdiction over such receiver, he may be compelled to accept and execute the trust in a second suit.[3]

The same general principle has been adopted in supplementary proceedings under the code of civil procedure; but the fact that a receiver has already been appointed in a previous action does not necessarily interfere with the appointment of another in a subsequent action. His functions are subordinate to those of the first, and he has a right to come in after the prior receiver becomes *functus officio*, and to take from him the fund or any remaining portion of it.[4]

Section 247. **Effect of Taking the Property Out of the Jurisdiction.**—While the jurisdiction of the courts is, upon general principles, limited to the state within which they act and from which they derive their authority, still courts of equity, acting in *personam*, often presume to act so as to affect property without the jurisdiction. Thus they may, in a proper case, take cognizance of suits for the specific performance of contracts relating to property without the state, and under such conditions, appoint

[1] Deming v. New York Marble Co. 12 Abb. Pr. 66.

[2] Ward v. Swift, 6 Hare, 309. See sections 17 and 18.

[3] Cagger v. Howard, 1 Barb. Ch. 368; Osborne v. Heyer, 2 Paige, 342.

[4] Bailey v. O'Mahoney, 33 N. Y. Super. Ct. 239. *Cf.* O'Mahoney v. Belmont, 62 N. Y. 133, 149. But where an insolvent submits to the appointment of a receiver at the instance of some of his creditors, he can not, by a subsequent assignment, give preference to certain of his other creditors, as to what may remain in the receiver's hands after the satisfaction of those at whose instance the receiver was appointed. In such a case the assets are in the hands of a court of equity for equitable distribution. McGowan v. Myers, 66 Iowa, 99, The matter of an interference of one receiver with another, as constituting a contempt of court, will be considered in one of the concluding sections of this chapter. See section 250 *et seq.*

receivers over property situated in another state and the like. In this connection a question will frequently arise as to the effect of a removal of property out of the jurisdiction of the court after the receiver has once taken possession of it. It will sometimes occur that after a receiver is appointed and has taken possession of the property, it is carried, either by the receiver himself, or his agents, or by a third person, out of the jurisdiction, and then the court must determine its powers and duties in the premises. The law is not entirely settled, but it is the better rule that, when property has once vested in a trustee, assignee or receiver, by the law of the state where the property is situated, the law of another state will not, even in favor of resident creditors, divest such trustee, assignee or receiver of his right to the property, although it have been taken out of the jurisdiction of the court by which the receiver was appointed and into the jurisdiction of another court.[1]

Section 248. **Effect of Appeals and of Proceedings to Which the Receiver is Not a Party.** — Where an order of reference was made directing the referee to appoint a receiver of the property of a company, and an injunction was granted restraining the trustees of the company from interfering with its property and affairs, and the trustees appealed from the order and obtained a stay of proceedings on the part of the referee pending the appeal, and, pending such appeal, one of the trustees, in his own behalf, commenced an action against the company and procured the appointment of a receiver, who entered into possession of the property and assets of the company, and, thereafter, the order was affirmed and the stay vacated and a receiver appointed, the court then, on the application of the receiver thus appointed, required the receiver appointed under the second order to deliver up the property and effects received by him.[2] And if an appeal be taken from an order appointing a receiver, without *supersedeas*, the court will not divest him, pending the appeal, of property which he has taken into his possession.[3]

Furthermore, the title to property having once vested in a receiver, he cannot be deprived of it by any judge, judicial officer or court in a proceeding to which he is not a party. Thus, where a

[1] Pond v. Cooke, 45 Conn. 126; Chicago, Milwaukee, etc., R. R. Co. v. Keokuk, etc., Co. 108 Ill. 317; s. c., 48 Am. Rep. 557.

[2] Deming v. New York Marble Co. 12 Abb. Pr. 66. The order in this case required the delivery on or before a certain day, allowing sufficient time for cause to be shown why the particular referee should not have been appointed.

[3] Schenk v. Peay, 1 Dill. 267. See section 116, 117.

receiver was appointed in supplementary proceedings, and a copy of the order was served on one, who had in his possession a note belonging to the debtor, and a demand was made on him for it, which was refused, and subsequently he delivered it, under an order from a county judge, to third persons, by whom it was discounted, and later the order was, on the application of the receiver, vacated, a copy of the order vacating it being served on such third parties, and the proceeds of the note demanded by the receiver, and refused, they were held liable in an action brought against them by the receiver.[1]

Section 249. **Effect of a Decree Discharging the Receiver.**— Where a receiver is appointed over property pending an action, and the receiver, having become possessed of more property than was sufficient to satisfy the demand, the plaintiff was directed to select property sufficient to discharge his claim, which he refused to do, and a selection was made, under the order of the court, by the clerk of the court, assisted by other skillful and disinterested persons, it was held that the property was made, by the decree, the property of the plaintiff, and that he could have demanded possession of it, and that it was liable for his debts, and, although the receiver had not been discharged by a formal order, yet he ceased to act as receiver and became henceforth the trustee of the plaintiff.[2]

Where the person entitled to the possession of the property has, at the time the receiver is discharged, taken the benefit of an insolvent law, the trustee appointed under it is entitled to the possession of the property, and the receiver will be directed to transfer it to him.[3]

III.

Of Interference With the Receiver—Contempt of Court.

Section 250. **Interference With a Receiver is Contempt of Court.**—"The principle is elementary that any interference with the possession of property placed in the hands of a receiver is a contempt of the court having control of it," and will be punished.[4] The power to punish for contempt is inherent in a court of chancery, and where there is an interference with the receiver in the regular

[1] Rogers v. Corning, 44 Barb. 229.

[2] Very v. Watkins, 23 How. (U. S.) 469. *Cf.* Harlock v. Smith, 11 L. J. (N. S.) Ch. 157: s. c. 6 Jur. 478.

[3] Glenn v. Gill, 2 Md. 1.

[4] Abbey v. International and Great Northern Railway Co. 5 Tex. Civ. App. 261; *In re* Tyler, 149 U. S. 164; Davis v. Gray, 16 Wall. 203; King v. Barnes, 51 Hun, 550.

performance of his functions as an officer of the court by which he is appointed and for which he acts, the court will hold such an interference a contempt of its authority, and will, when the circumstances justify it, punish the offender by fine or imprisonment.[1] The interference may consist of an attempt to deprive the receiver of property of which he has taken possession under the order of the court. This attempt may be made either forcibly or by commencing an action at law or other proceeding, without permission of the court by which the receiver was appointed. That such an unauthorized proceeding is a contempt results from the fact that the receiver holds the property as an officer of the court, and, that as such, his possession is the possession of the court. Thus, where a receiver was appointed, and the defendant assigned to him his property, consisting in part of a vessel which he had previously leased and upon which there was, at the time of the assignment, some rent past due to the ship owner, it was held that the act of the owner in issuing a distress warrant for the rent, and the act of a constable in taking possession of the vessel, under the distress warrant, while it was in the possession of the receiver, were, each of them, contempt of court, for which both were liable to punishment.[2]

Where a sheriff seizes goods in possession of a receiver, after notice of the appointment of the latter by the court, he is not protected by the process in his hands, unless it was issued by leave of the court; his seizure is a contempt of the order of the court, and subjects him and his assistants to punishment, and there must be a restoration of the property. This will be so even though the title of the claimant be paramount to that of the receiver.[3] And if the officer making the levy is notified at the time of making it that the

[1] Noe v. Gibson, 7 Paige, 513; Hull v. Thomas, 3 Edw. Ch. 236; De Visser v. Blackstone, 6 Blatchf. 235; Secor v. Toledo, etc. Ry. Co. 7 Biss. 513; King v. Ohio, etc. R. R. Co. Id. 529; Beverly v. Brooke, 4 Gratt. 211; Spinning v. Ohio Life Ins. & Trust Co. 2 Disney, 368; Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792; Langford v. Langford, 5 L. J. (N. S.) Ch. 60; Broad v. Wickham, 4 Sim. 511; Skip v. Harwood, 3 Atk. 564; Anonymous, 2 Mod. 499.

[2] Noe v. Gibson, 7 Paige, 513. The court said in this case that "where a receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the court, upon notice to the receiver, for an order that the receiver pay the rent, or that the landlord be at liberty to proceed, by distress or otherwise, as he may be advised. And if the claim is contested, the court will permit the claimant to go before the master and be examined *pro interesse suo*." S. P. Riggs v. Whitney, 15 Abb. Pr. 388; O'Mahoney v. Belmont, 62 N. Y. 138, 149.

[3] Commonwealth v. Young, 11 Phila. 606.

property is in the possession of a receiver, he will be liable if he proceed further.[1]

So, also, if one, with knowledge of the appointment of a receiver, interfere, by attachment or otherwise, with property to which the receiver is entitled under the order of his appointment, but of which he has not taken possession, he may be punished for contempt.[2] This is the rule even where the property attached is in a state other than the one in which the receiver is appointed.[3] And if a receiver, appointed subsequently by another court, interferes without authority he will also be guilty of contempt.[4]

Section 251. **What will amount to an Interference.**—In order to constitute an interference with the receiver's right, he must be in possession, actual or constructive, of the property involved. Accordingly, if the property seized be only such as may be reached by a receiver, there will be no contempt.[5]

If a receiver has been appointed over real estate, and the tenants thereof have attorned to the receiver, they cannot subsequently question the right of the court to the possession of the property, and any subsequent interference on their part with the receiver's constructive possession will be a contempt. But on the other hand, if the receiver was not in possession, either by himself or his tenants by attornment or by his agents, he cannot enforce a delivery of the property by proceedings as for a contempt against an officer levying upon the same.[6] The interference need not amount to an actual dispossessing of the receiver, but may consist in commencing suits against him, without obtaining leave of the court, or in attempts to intimidate him in respect of his possession.[7]

It has recently been held in England that where, in a partnership action, a receiver and manager of the business has been appointed,

[1] Lane v. Sterne, 3 Giff. (Eng.) 629. In this case the notice was in writing.

[2] Richards v. People, 81 Ill. 551; Hazelrigg v. Bronaugh, 78 Ky. 62.

[3] Chafee v. Quidnick Co. 13 R. I. 442, where the attachment was made by an attorney who had appeared for the defendant and consented to the appointment, the attachment being made for the purpose of securing his fees. See section 254.

[4] Spinning v. Ohio Life Insurance & Trust Co. 2 Disney, 368. See section 246.

[5] Albany City Bank v. Schermerhorn, 9 Paige, 372.

[6] Albany City Bank v. Schermerhorn, 9 Paige, 372, 378. *Contra* Richards v. People, 81 Ill. 551; Hazelrigg v. Bronaugh, 78 Ky. 62; Chafee v. Quidnick Co. 13 R. I. 442. See section 250. In the cases last cited the party had actual notice, or was a party to the proceedings in which the receiver was appointed.

[7] *In re* Higgins, 27 Fed. Rep. 443; Parker v. Browning, 8 Paige, 388.

the issuing of a circular to the customers of the firm, containing statements which would lead them to infer that the business is in a failing condition or might shortly fail, is a libel on the business, and such an interference with the receiver in the discharge of his duties as will constitute a contempt, which the court will punish by imprisoning the sender of the circular.[1]

But where the defendant had leased property, receiving as rent a certain share of the crops raised, and a sheriff, without notice of the appointment of a receiver of the landlord, levied on his share, but, on being notified of the appointment, consented that the receiver should take possession of the defendant's interest and dispose of the same, and hold the proceeds subject to the order of the court of chancery, he was held not guilty of contempt.[2]

An action to enforce a mechanic's lien, it has been held in Arkansas, may be instituted against property in the hands of a receiver.[3] But it has been held in New York that if a corporation, of the property of which a receiver has been appointed with power to continue the business, has the exclusive right in a patent, and one of its former officers, under a license from the patentee, commences to make the patented article, his so doing will constitute a contempt.[4]

Where a receiver of the rents of real property is appointed, his first duty is to notify the tenants of his appointment and to direct them as to the payment of rent in the future, and if subsequently he be prevented from collecting the rent, he should make application to the court for an attachment. In such a proceeding his own affidavit upon information and belief, the tenants having informed him of the nature of the interference, will be sufficient to warrant the court in issuing the order.[5] And it has been held that an order may issue for the commitment of a person who has taken forcible possession of property belonging to the receiver, there being proof of a due service of a notice of the motion, without a rule *nisi* first obtained.[6]

Section 252. **Contempt on the Part of the Defendant — Proof of Contempt.** — The court, in appointing a receiver, may direct the defendant to deliver his property to the receiver or to execute an

[1] Helmore v. Smith, 56 L. J. (Ch. D.) 145 (1886); s. c. 1 Ry. & Corp. L. J. 349.

[2] Albany City Bank v. Schermerhorn, 10 Paige, 263.

[3] Richardson v. Hickman, 32 Ark. 406.

[4] *In re* Woven Tape Skirt Co. 12 Hun, 111. See also section 232.

[5] Anon. 2 Mod. 499

[6] Broad v. Wickham, 4 Sim. 511.

assignment or do some other act in the premises to make the appointment more efficacious. If the defendant, in such a case, refuse or neglect to comply with the order, he may be adjudged in contempt and imprisoned summarily, upon motion of the receiver, until he comply with the order.[1]

Where the defendant is directed to deliver his property to the receiver under the direction of a master, the proper course is for the receiver, or the party concerned, to call upon the master to decide, upon the examination of the defendant and on the evidence before him, what property legally or equitably belonging to the defendant and to which the receiver is entitled under the order of the court, is properly in the defendant's possession or under his power and control. It is, thereupon, the duty of the master to direct the defendant to deliver to the receiver the actual possession of all such property, in such manner and within such time as the master may think reasonable. And if the property be in the possession of a third person who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it or the complainant should make such third person a party to the suit and apply to have the receivership extended to the property in his hands.[2]

To sustain a contempt proceeding for interference with property in possession of a receiver, the guilt of the accused must be shown beyond a reasonable doubt.[3]

Section 253. **What will Not Amount to a Contempt on the Part of the Defendant.**— But where an order is made directing the defendant to deliver certain notes held by him, as trustee, to a receiver, and the case is referred to a referee to summon the parties before him and to direct the delivery to be made, the delivery need not be made to any person other than the receiver in person, and a refusal to deliver the property upon a demand by the plaintiff, his attorney or the referee will not amount to a contempt.[4] The receiver must make the demand in person,[5] and a defendant will not be in contempt for refusing to deliver property to a receiver where it appears that the property had been bought at a sheriff's sale under an execution and the defendant had subsequently been allowed its use by the purchaser. In such a case the alleged owner

[1] People v. Rogers, 2 Paige. 103.

[2] Parker v. Browning, 8 Paige, 389, per Chancellor Walworth; Cassilear v. Simons, Id. 273.

[3] United States v. Jose, 63 Fed. R. 951.

[4] Panton v. Zebley, 19 How. Pr. 394. *Cf.* Green v. Green, 2 Sim. 430; Dove v. Dove, 2 Dick. 617.

[5] McComb v. Weaver, 11 Hun, 271.

of the property should have been made a party and his title determined in the usual way.[1]

Section 254. **The Rule Herein where the Property is Without the Jurisdiction.** — Where a court of equity has jurisdiction over the person of a defendant, it is familiar learning that it may make decrees and orders affecting his property which is situated outside of its jurisdiction. The usual procedure when the court exercises this power is to compel the defendant to execute such an instrument as will be effectual to carry out the orders of the court concerning the property without the jurisdiction. The fact that the instrument is executed to escape a proceeding to punish for contempt will not amount to such duress as will warrant a court in another jurisdiction to interfere, even though such foreign court have not the power of itself to grant such an order. The principle of comity will, in the latter case, prevent an interference. But, even where such an assignment is not executed, the court will prevent the defendant from so dealing with the property, either personally or by his agents, as to defeat the ultimate execution of the decree. Thus where receivers were appointed of the property of a defendant in England, and he had property in Ireland which he directed his agents there to refuse to deliver to the receivers, the court said: "That this is a contempt I have no doubt. It is true that this court has not the means of sending its officers to carry into effect its orders in Ireland, but it has jurisdiction over all persons in this country and can compel obedience to its orders."[2] But a foreign receiver will not be permitted, as against the claims of creditors resident in another state, to remove from that state the assets of the debtor, it being the policy of every sovereignty to retain in its own hands the property of a debtor until all claims in favor of its own citizens have been satisfied.[3]

Section 255. **Only the Court Wherein the Receiver is Appointed Can Entertain a Proceeding for Contempt.** — The power to punish for contempt being plainly a judicial prerogative can not be exercised by a ministerial officer of the court. The offence is not a violation of law, but a disregard of the mandate of a court; it, therefore, devolves upon some judicial officer of that court to entertain the proceeding to punish the offender. Accordingly the

[1] Robeson v. Ford, 3 Edw. Ch. 441.

[2] Langford v. Langford, 5 L. J. (N. S.) Ch. 60.

[3] Chicago, Milwaukee, etc., R. R. Co. v. Keokuk, etc., Co. 108 Ill. 317. In this case, however, it seems that the enunciation of this rule is a *dictum*. The rule itself is well settled.

receiver himself being merely the servant of the court, has no power to adjudge a party in contempt. Neither does such power inhere in any court other than the one by which the receiver is appointed; it is that court alone whose authority is disputed, and to that court alone belongs the power to adjudge the act complained of a contempt. Nor, ordinarily, can a referee decide what is a contempt unless specially given that power, his duty generally being merely to examine into the necessity of appointing a receiver, or the nomination of a suitable person to be appointed, or the discovery of assets subject to the receivership. Thus, where a referee or commissioner was appointed to take an account of the property involved in the suit, he can not decide that an attachment for contempt ought to issue.[1]

Section 256. **What Constitutes Sufficient Notice of Appointment of the Receiver Herein.**— It seems to be settled law that after a receiver has been appointed, any interference with his possession will be a contempt irrespective of formal notice of the appointment, provided there can be shown to have been some actual notice thereof.[2] It has been declared that an order appointing a receiver is of such notoriety that all persons have constructive notice thereof.[3] The federal court has asserted that ignorance that the property was in the possession of a receiver is no defence to a contempt proceeding.[4]

Where a partnership had been dissolved, and a suit was commenced by one of the partners for an accounting, and it appeared that two of the partners, without the consent and in fraud of the rights of the complainant, had sold some of the firm's effects, and further that the court had, on motion, after due notice, appointed a receiver and granted an injunction, and that before the injunction or order could be served, one of the defendants discounted the notes which had been taken in payment for the property, and the other shared the proceeds, both were adjudged guilty of contempt.[5] And where the defendant was present in court

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[1] Geisse v. Beall, 5 Wis. 224.

[2] Skip v. Harwood, 3 Atk. 564; Lewis v. Singleton, 61 Ga. 164. *Cf.* Howe v. Willard, 40 Vt. 654.

[3] Memphis & Charleston R. R. Co. v. Hoechner, 14 U. S. C. C. App. 469. This was said of an order appointing a receiver of a railroad.

[4] *In re* Acker, 66 Fed. R. 290.

[5] Hull v. Thomas, 3 Edw. Ch. 256. The Vice-Chancellor, McCoun, cited Osborne v. Tenant, 14 Ves. 136, [where the defendant and his attorney were apprised of the granting of an injunction by being in court, and it was held sufficient notice to put them in contempt], and Kimpton v. Eve, 2 Ves. & B. 348, [where the notice was a letter].

during the hearing on a bill for an accounting, and in consequence knew of the order appointing a receiver, he was adjudged to be in contempt for removing a portion of the firm's assets before the decree was drawn. Lord Hardwicke said, in this case, "where a person attends a cause to which he is a party, * * * and had notice of the decree by being present when it was pronounced in court, if he does any act that is a contravention to the decree, he is guilty of a contempt and punishable for it, notwithstanding the decretal order is not drawn up, * * * or else it would be extremely easy to elude decrees."[1]

But where a defendant, in action to foreclose a mortgage, had assigned the rents to certain other persons, which assignment was subsequent to the execution and recording of the mortgage, but before the foreclosure, and pending the proceedings, a receiver of the rents was appointed, who never secured possession or control of the property and took no steps to compel an attornment of the tenant to him, it was held not to constitute a contempt, for one of the assignees, after notice of the appointment, none of them being parties to the foreclosure proceedings, to collect the rents and to refuse to pay them to the receiver.[2] Where the interference was not willfully committed, or where the act complained of was done under a mistake of law, the court, as a rule, will impose a fine sufficient to cover damages and costs, but will not commit.[3]

Section 257. **The Rule Where the Appointment is Irregular or Erroneous.**—The effect of an irregular or erroneous appointment of a receiver in respect of his title and possession has already been considered.[4] But when an irregularity, informality or error in the appointment is set up in defence of a proceeding to punish for contempt of court in resisting the receiver's authority, or in disregarding the mandate of the court in any matter concerning the receivership, a question is presented somewhat different from those which arise in such a case concerning the receiver's title or possession. If the court has jurisdiction to appoint a receiver, mere irregularity or error in making the appointment is not sufficient to render the appointment void and to absolve the parties in interest from their legal duty to render obedience to the orders of the court in respect thereto. It is, accordingly, settled law that any inter-

[1] Skip v. Harwood, 3 Atk. 564; Anon. Id. 567.

[2] Bowery Savings Bank v. Richards, 3 Hun, 366, citing Parker v. Browning. 8 Paige, 388, 390; and Sea Ins. Co. v. Stebbins, Id. 565.

[3] Noe v. Gibson, 7 Paige, 513; Lane v. Sterne, 3 Giff. (Eng.) 629.

[4] Sections 215, 241.

ference with a receiver, or any disregard of the mandates of the court concerning the property subject to the receivership, is a contempt of court, even though it be shown that the appointment of the receiver was irregular or the order erroneous. The appointment cannot be attacked collaterally, when the court had jurisdiction to act.[1] A dissatisfied party must seek his remedy by appeal, and not by setting at defiance the authority of the court; and strangers to the suit, who, nevertheless, have an interest in the subject-matter, may have their relief by a direct proceeding looking to the removal of the receiver and the setting aside of the orders in reference to the receivership.[2]

This being the law the court will not, in a proceeding to punish for contempt, review the questions which were passed upon when the receiver was appointed. It is sufficient, for the purpose of such a proceeding, that the receiver was appointed, and that there is an interference with his possession, or a defiance in any respect of the authority of the court.[3] Accordingly, if a sheriff has taken goods under an execution, after having been notified that they were in the possession of a receiver of the debtor's property, the claim that the appointment was improper will not justify the seizure, and the court cannot, in a proceeding to punish the contempt, be called upon to decide as to the validity of the objection to the order of the appointment.[4]

Section 258. **The Title to the Property Cannot be Adjudicated in Contempt Proceedings.** — It is also equally well settled that in a proceeding to punish for contempt of court, the question of the title to the property cannot arise or be adjudicated. The court will not in such a proceeding, do more than pass upon the bare question of contempt. It will not, directly or indirectly, assume to consider or to decide to whom the property belongs, or to decide that the receiver has, or has not, the right of possession in and to it.[5] The question is whether there has been an interference, in an unauthorized way, with an officer of the court. Thus where one interferes with the collection of the rents of certain property in the hands of a receiver, claiming title thereto under a conveyance from the defendant, the court will not decide the ques-

[1] Section 185.

[2] People v. Sturtevant, 9 N. Y. 263, 269.

[3] Albany City Bank v. Schermerhorn, 9 Paige, 372; Richards v. People, 81 Ill. 551; Cook v. Citizens' National Bank, 73 Ind. 256.

[4] Russell v. East Anglian Ry. Co. 3 Mac. & G. 104.

[5] Text quoted and approved in Baldwin v. Hosmer (Mich.), 59 N. W. R. 432.

tion of title in proceedings to punish him for contempt.[1] And if the claimant remove the property out of the jurisdiction the court may compel him to pay the receiver the value of such property.[2]

Section 259. **Contempt on the Part of the Receiver — Conflict of Receiverships.** — A receiver himself may be guilty of contempt in two ways; (*a*) Where he refuses or neglects to comply with the order of the court appointing him, and (*b*) where there is a conflict of receivers, and one or two or more receivers of the same property interfere with the possession of another receiver, or prevent or hinder the due discharge of duty by that other receiver in respect of the property in dispute. A receiver being a mere officer of the court appointing him, and exercising ministerial functions only, is bound to obey every order which the court may make affecting the disposition of the property in his hands as its receiver, and hence if he neglect or refuse to comply therewith, he stands in no better position than any other person, and may be punished in the same way. But where an order was made directing a receiver to turn over the property and discharging him from further responsibility concerning it, and he took steps to perfect an appeal to a higher court, the court by which he had been appointed, inasmuch as he expressly disclaimed any intention to disregard the order, refused to issue an attachment.[3]

Again, where a second receiver interferes with the possession of a receiver in charge of property under a prior appointment, he is liable to be punished for contempt, even though the court appointing him has acquired jurisdiction in the matter.[4] But where the second receiver is appointed by a different court which had jurisdiction, and he, acting in good faith, takes into his possession property subject to the other receivership, the court will first determine the question of priority and direct as to the transfer of the property, before it will entertain proceedings for contempt.[5] And where the dispute as to the right of possession determines adversely to the second receiver, and the only object of the contempt proceeding is to compel the payment of the costs, the court will not, in general, incline to do more than make an order for their payment.[6]

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[1] *Ex parte* Hollis, 59 Cal. 405.

[2] *In re* Day, 34 Wis. 638.

[3] *In re* Colvin, 3 Md. Ch. 300.

[4] Spinning v. Ohio Life Insurance & Trust Co. 2 Disney, 368.

[5] People v. Central City Bank, 53 Barb. 412; s. c. 35 How. Pr. 428.

[6] Ward v. Swift, 6 Hare, 309; s. c. 12 Jur. 173.

CHAPTER X.

OF THE RECEIVER'S RIGHTS AND POWERS.

Section 260. Of the Rights and Powers of Receivers Generally.
261. Particularly of the Rights and Powers of Temporary, Permanent and Ancillary Receivers.
262. How Far the Receiver's Rights and Powers are Conferred by the Order of His Appointment.
263. How Far the Receiver's Personal Rights are Affected by the Appointment — Arrest.
264. Statutory Receivers — Their Rights and Powers.
265. The Receiver Holds the Property for the Benefit of all Parties Until After the Decree.
266. The Rights of a Receiver in Taking Possession of the Property for Which He is Appointed.
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268. The Powers and Rights of Receivers in Other States and Jurisdictions — Effect of Appointment on Property in Other States and Jurisdictions — Rights of Creditors of Other States.
269. Right to Exercise His Own Discretion.
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271. Of the Receiver's Right to Originate Proceedings.
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274. Of the Power to Employ Counsel — Compensation and Selection of.
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276. Of the Receiver's Right to the Protection of the Court.
277. The Same Subject Continued — Strikes.
278. The Power to Compromise Disputed Claims Against the Fund.
279. An Advantageous Settlement of a Claim, Although Made Without Express Authority, will be Approved.
280. A Receiver Cannot Ordinarily Purchase or Bid at a Sale of the Estate.
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283. Receiver's Powers to Pay Out Money and Deliver Property — Distribution.
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288. The Powers of Receivers in Leasing the Property.
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Section 291. The Right to Make Repairs Upon the Property in His Hands.
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294. The Right to Resort to Hypothecated Property for Expenses, etc.
295. Right of Receiver to Appeal — Bond.
296. Statute of Limitation — Of the Effect of the Receiver's Act Upon the Statute.
297. Rights of a Receiver in Place of an Assignee — Fraudulent Conveyances.
298. Rights of Receivers to Attack Judgments Confessed and Conveyances Fraudulently Made by Debtor.
299. Of Officers Having the Powers of Receivers, Although Not Appointed as Such.
300. Of the Termination of a Receiver's Functions by Abatement or Supersedeas.

Section 260. **Of the Rights and Powers of Receivers Generally.** — In defining the powers of receivers it must be considered whether they are common-law or statutory, temporary or provisional, or permanent receivers.[1] In speaking here of their powers generally, provisional or temporary common-law receivers will be meant, when no express reference to statutory or permanent receivers is made, whose powers are defined in other sections.[2] It is the former class of receivers that largely prevails.

The principle underlying the question of the powers of a receiver is that he is an officer of the court, "its hand," as it is metaphorically put. The court is the principal and employer; the receiver is the agent and servant. His possession is the possession of the court.

It follows logically that the powers of a receiver emanate from the court and are expressed in its orders, to which the receiver must look for guidance, and render strict account and obedience.

But the orders of the court do not contain every right and all authority of the receiver; there are implied and incidental powers which he may exercise, and which often create a correlative duty; powers which, when exercised without express authority of the court, it will not deny, and the result of which it will accept and approve. It is more particularly of such powers we wish now to speak.

It may be stated as the general and prevailing doctrine that a receiver has only such powers as are conferred by the order of the court, under the general principles of the law and due course of procedure.[3]

[1] See section 8.

[2] Sections 261 and 264.

[3] Texas and Pacific Railroad Co. v. Gay, 86 Tex. 571; Davis v. Gray, 16 Wall. 203.

The powers of a receiver have been said to be "in the nature of those of a guardian of a ward's estate; but his relations are all of a fiduciary character."[1] "The property is held for whomever may ultimately establish title to it, and the receiver has no power to make any contract regarding it unless authorized by the court."[2]

A receiver has not authority, without previous direction of the court, to incur any expense on account of the property in his possession, not essential to its preservation and use, as contemplated by his appointment. Due regard must always be had, not only to the nature and character of the property in the custody of the receiver, but to the exigencies which may require action to preserve and save it.[3] The receiver not only has power to insure property, but would, under some circumstances, be derelict in duty if he failed to do so without waiting for any direction from the court.[4] That a receiver pays for a policy of insurance without a previous order of the court is no concern of the insurance company, and does not affect the validity of the policy.[5]

The doctrine is sound and universally accepted, that, while a receiver is, strictly speaking, without power to incur any expense or pay out money unless ordered to so do, yet, when he does so to protect and preserve the property, and the action is beneficial to the parties, it will be approved by the court.[6] The court may ratify the action of its receiver, which will be considered upon the same principles applicable to individuals.[7]

"A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property."[8]

A receiver is regarded as the executive officer of a court of chancery in much the same sense as a sheriff is of a court of law. "A receiver must, in the absence of statutory authority, derive his powers largely from the established principles of courts of equity,

[1] Thompson v. Holladay, 15 Oreg. 34.
[2] Id.
[3] Thompson v. Phœnix Insurance Co. 136 U. S. 287.
[4] Id.
[5] Id.
[6] Id.; Henry v. Henry (Ala.), 15 So. R. 916. See section 291 as to making repairs.
[7] Smith v. United States Express Co. 279.
[8] Union National Bank v. Kansas City Bank, 136 U. S. 223; Quincy, Missouri & Pacific Railroad v. Humphreys, 145 U. S. 82.

and in this respect, as well as in his relations to the court appointing him and the consequent restriction upon his powers, a receiver occupies a somewhat different position from that of an executor or administrator. Strictly, a receiver has no right to incur any liability or in any way hazard the funds in his custody without the consent of the court. * * * It has been held also that courts will not allow a receiver any payments made to counsel for services when the employment of such counsel has not been authorized by the court."[1]

The authority of a receiver being specifically defined by the court in the order of appointment, all other authority is excluded except such as may be fairly implied from the expressed authority.[2] That a receiver has implied powers which the court will recognize, is to be conceded.[3]

The supreme court of Georgia has recently said: "Although this is the day of receivers, and their dominion seems to be rapidly extending all over the land, the courts, as yet, are hardly prepared to sanction their being let loose upon the general public, free from all restraint or responsibility."[4]

A receiver has no power, without the sanction of the court, to make a contract, which, in itself, would make the property in his possession responsible for its performance.[5] Strictly speaking a receiver cannot incur any expense without the court's authority first obtained. The liability of the receiver otherwise, would be a personal one.[6]

The cautious and prudent receiver will, before incurring any expense or paying out any money first petition the court for an order and directions. But in cases of necessity, for the protection and preservation of the property, he should not hesitate to do either one or both.

It has been said that a receiver has power to enforce a contract notwithstanding its consideration was the commission of an act by him which was in violation of the order of the court and a breach of his official duty.[7] Where the object of the suit was to have the property sold, and a receiver was appointed in aid of the bill, it was

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[1] Walsh v. Raymond, 58 Conn. 251.

[2] Henry v. Henry (Ala.), 15 So. R. 916.

[3] International & Great Northern Railroad Co. v. Herndon (Tex. Civ. App.), 33. S. W. R. 377.

[4] Hale-Berry Co. v. Diamond State Iron Co. 22 S. E. R. 217.

[5] International & Great Northern Railroad Co. v. Herndon (Tex. Civ. App.), 33 S. W. R. 377.

[6] Meyer v. Lexow, 37 N. Y. S. 67; Tozar v. O'Gorman (Minn.), 61 N. W. R. 895.

[7] O'Gorman v. Sabin (Minn.), 64 N. W. R. 84.

held that he could sell the property without petitioning the court for authority to do so.[1]

Receivers of federal courts derive their powers from national laws.[2] This was said in denying the contention that the statute of a state declaring that the discharge of a receiver pending an action against him shall not operate to abate the action, was applicable to a receiver appointed by a federal court.

A receiver, it has been said, appointed to succeed an assignee is possessed of the rights of the latter;[3] while another court has asserted that a receiver appointed to take charge of a ward's estate, the guardian being removed, is not invested with the powers of a guardian, but is to act under the control of the court until the appointment of another guardian.[4]

A receiver must obey the order of the court.[5] He cannot perform any of the duties or exercise any of the powers of his office until he gives bond as required by the order appointing him.[6] He may correct a mistake in his report,[7] but he should have the previous authority of the court before paying taxes.[8]

It has been said of a receiver that "the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency."[9]

A receiver has no right to obstruct a road, even where there had been vacating proceedings, but which were defective for want of notice.[10]

A receiver of a railroad company was appointed in a foreclosure proceeding, and an intervening petition was filed by an employee who was injured by the servants of the receiver while operating the railroad. The receiver answered the petition, and the court referred the issue of negligence to a jury, which returned a verdict in favor of the petitioner. The receiver appealed from the decree rendered against him requiring payment of the amount. It was held that the motion to dismiss the appeal should be overruled because the receiver represented all parties in interest; he stood for the railroad company as well as all persons having claims against it, and had a right to appeal.[11]

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[1] Smith v. Burton (Vt.), 32 At. R. 467.

[2] Fordyce v. Beecher (Tex. Civ. Ap.) 21 S. W. R. 179.

[3] Sullivan v. Miller, 106 N. Y. 635.

[4] Temple v. Williams, 91 N. C. 82.

[5] Burroughs v. Bunnell, 70 Md. 18.

[6] Woods v. Ellis, 85 Va. 471.

[7] How v. Jones, 60 Io. 70.

[8] Brooks v. Town of Hartford, 61 Conn. 112.

[9] Quincy, Missouri & Pacific Railroad Co. v. Humphreys, 145 U. S. 82.

[10] Felton v. Ackerman, 9 U. S. C. C. App. 457.

[11] Thon v. Pittard, 10 U. S. C. C. App. 352; 62 Fed. R. 282.

Section 261. **Particularly of the Rights and Powers of Temporary, Permanent and Ancillary Receivers.**—In a previous section the several kinds of receivers have been named and defined.[1] We wish here to speak specially of the rights and powers of temporary, permanent and ancillary receivers for the purpose of distinguishing between them.

Receivers appointed *pendente lite* are merely temporary officers of the court, and are properly termed temporary receivers. They do not possess the full powers of permanent receivers, unless specially conferred on them.[2] Their powers are restricted to the care and preservation of the estate committed to their charge, and their authority is such only as is expressly or impliedly contained in the order of the court. A temporary receiver is not invested by his appointment with the title to the property.[3] His right is one of possession only.[4] He has power to receive the debts, demands and other property of the debtor, to preserve the same, and, in proper cases, to sell or dispose of the property as directed by the court.[5]

When the acts of a temporary receiver are duly sanctioned by the court they are the acts of the court; but otherwise they have no greater effect than the acts of any unauthorized officer or agent.[6]

In the preceding section the rights and powers of temporary receivers are fully set forth.

The appointment of a permanent receiver being particularly to enforce the final decree in the litigation, his rights and powers are more readily defined and understood than those devolving on temporary receivers.

Permanent receivers also derive their rights and powers from the court, through its final decree. Unlike temporary receivers they become invested with the title to the property,[7] and have authority to do all things necessary to accomplish the purpose of their appointment. But they and their acts are at all times subject to the control and approval of the courts whose officers they are. Their powers are recognized as being greater than those of temporary receivers.[8]

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[1] Section 3.

[2] Decker v. Gardner, 124 N. Y. 334.

[3] Section 225.

[4] Felter v. Maddock, 32 N. Y. S. 292; Buckley v. Harrison, 31 N. Y. S. 999; Doolin v. Mayor of New York, 23 N. Y. S. 888.

[5] Id.; Wulff v. Superior Court, 42 Pac. R. 638; Forsaith Machine Co. v. Hope Mills Lumber Co. 109 N. C. 576. In Brush v. Jay, 113 N. Y. 483, an order directing a temporary receiver to sell property was declared to be error.

[6] Negus v. City of Brooklyn, 62 How. Pr. 291.

[7] See section 209.

[8] Decker v. Gardner, 124 N. Y. 334.

The powers of an ancillary receiver, also called an auxiliary receiver,[1] have thus been defined: "In general an auxiliary receiver is merely a custodian of the property within the state where he is appointed, for the purpose of preserving the assets belonging to the party or corporation proceeded against within the state, in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims. Therefore, as a general rule, the person so appointed is a mere common-law receiver to protect the property, and has only the powers conferred by the order appointing him. * * * We think the powers of such a receiver are closely analogous to a temporary receiver in an ordinary judgment creditor's bill."[2]

This is a clear and correct statement of the general rights and powers of ancillary or auxiliary receivers.[3]

Section 262. **How Far the Receiver's Rights and Powers are Conferred by the Order of His Appointment.**—It may be said, in a general way, that a receiver has no powers except such as are conferred upon him by the order by which he is appointed, and by the practice and usage of the court.[4] He is merely an officer of the court; his appointment determines no right, and in no way affects the title to the property; his holding is the holding of the court; and he has no right to ask for a revision of the order removing him, any more than a stranger to the cause.[5] He is but a minister, and, therefore, has not the discretionary power of a person acting in a fiduciary character; nor can he do any single act likely to seriously diminish the fund, without special leave of the court.[6] In theory, the court itself has the care of the property in his hands, for the benefit of the party or parties ultimately entitled to it.[7] He is not, however, merely the assignee of him whose property is placed in his care,[8] but he may exercise such powers, in dealing with the property, as belong to a receiver according to the practice of the court of chancery, and in addition thereto such special powers as are particularly conferred upon him by the order of his appointment.

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[1] See section 8.

[2] Buckley v. Harrison, 31 N. Y. S. 999.

[3] See as to right of receivers to sue, chapter 20.

[4] Grant v. Davenport, 18 Iowa, 179; Verplanck v. Mercantile Ins. Co. 2 Paige 452; *In re* Colvin, 3 Md. Ch. 278.

[5] *In re* Colvin, *supra*.

[6] Hooper v. Winston, 24 Ill. 353.

[7] Devendorf v. Dickinson, 21 How. Pr. 275, 276.

[8] King v. Cutts, 24 Wis. 627.

Section 263. **How Far the Receiver's Personal Rights are Affected by the Appointment—Arrest.**—The fact that a receiver is an officer of the court does not entitle him to any privileges above other suitors; in seeking relief he must use the same proceedings that other suitors are required to use.[1] Accordingly, in an action brought by a creditor of a corporation against a receiver thereof, in his official capacity, no personal judgment can be rendered against him; the judgment must be entered against him as receiver, and must be made payable out of the funds held by him in that capacity.[2]

A receiver when ordered to dispose of the fund in his hands, or any part thereof, as where he is directed to return money collected by him, cannot off-set a personal claim which he may have against the person to whom he is ordered to pay it. In a case involving this question it was said: "If the mere agent or instrument of the court can be permitted, after receiving funds under its order, to set up claims to them wholly foreign to the object of his appointment, the position of a receiver is perverted into that of a speculator in funds, constructively, at least, in court, and their destiny becomes as uncertain after they enter the precincts of the court as before. The court will not thus permit itself to be made a *quasi* suitor."[3]

In Ireland a receiver is exempt from arrest, upon civil process, while in attendance upon the court in his official capacity; so when a receiver was arrested for debt, while attending a motion affecting his receivership, he was discharged upon the ground that he was privileged from arrest.[4]

To arrest a receiver for an alleged violation of an ordinance prohibiting that which was declared to be a nuisance, has been adjudged to be contempt of the court.[5]

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[1] Receivers of State Bank v. Nat. Bank of Plainfield, 34 N. J. Eq. 450, 458; Barker v. Beeber, 5 Atl. Rep. 1 (Sup. Ct. Penn. 1886.)

[2] Woodruff v. Jewett, 37 Hun, 205, 208 (1885.)

[3] Johnson v. Gunter, 6 Bush, 534, 536.

[4] Brabazon v. Teynham, 2 Ir. Ch. (N. S.) 563.

[5] United States v. Murphy, 44 Fed. R. 89. We quote from this case as follows: "It is undoubtedly true that the position of a receiver of a federal court does not afford such officer immunity from arrest for a violation of the ordinary criminal statutes of a state. But the question here is whether the court that has, in an action over which its jurisdiction is unquestioned and beyond question, taken into its possession the property involved in it and appointed a receiver to manage and operate the property for the benefit of the parties in interest, will permit its officer, who is but the hand of the court, to be arrested or otherwise interfered with in the discharge of his duties under the order of the court. * * * Because the receiver of a court would not be exempt from arrest for murder or grand larceny

Section 264. **Statutory Receivers—Their Rights and Powers.**—In very many, if not all, of the states there are statutes providing for the appointment of receivers for particular purposes, as for winding up corporations, in supplementary proceedings and the like, and their rights, duties and powers are, by such statutes, marked out with more or less precision. In such cases the officers whose authority is so created and specified have been said to more nearly resemble statutory assignees than receivers of the court of chancery;[1] but in another jurisdiction it has been asserted that the powers and functions of statutory receivers "are far more extensive than those of an assignee in a voluntary assignment;" that he represents the interests of both debtor and creditors, and is a trustee for all parties.[2]

In New Jersey it has been decided that such officers derive their powers wholly from the statute, but the powers need not be expressly given, it being sufficient if they may be fairly inferred from the general scope of the statute; and, consequently, that although the power to administer an oath is not expressly given to them, yet, if they are to hear and decide upon claims presented to them against a corporation, an implied power is thereby given them to

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or any other crime committed outside and independent of his duties as such officer, it by no means follows that immunity from arrest will not extend to him for acts done in discharge of the duties imposed upon him by the order of the court having jurisdiction in the premises. If the receiver can be arrested and imprisoned for doing the very thing the court appoints him to do — in this instance, for operating the motor road in precisely the same way it was being operated at the time of the commencement of the action in which he was appointed, and in precisely the same way in which the road has been operated ever since its construction—it is manifest that the power of the court to appoint a receiver to take possession of the property, and manage and operate it for the benefit of the parties in interest, would be a power in many case barren of results. The consent of the receiver is always subject to the control of the court appointing him, and in any case, where the receiver, in the exercise of the powers conferred upon him, interferes with the rights of any third person, it is presumed that an appropriate application to the court having control of him will remedy the wrong; or the aggrieved party may have recourse to any appropriate civil action against him, by virtue of section 8 of the act of March 3, 1887. But in my opinion no individual can be permitted to cause the arrest or imprisonment of a receiver for doing what the court, having jurisdiction in the premises and in the exercise of a power which, it seems to me, cannot be doubted, orders him to do."

[1] Attorney-General v. Life and Fire Ins. Co. 4 Paige, 224.

[2] Powers v. Hamilton Paper Co. 60 Wis. 23. Held that such receiver could maintain an action to recover property fraudulently conveyed by the insolvent.

administer oaths to witnesses examined on the hearing.[1] It has also been held in the same state that receivers appointed under a statute have a discretion in the management of the trust property, for the due exercise of which they are responsible to the court appointing them, and in the exercise of which they are under its control.[2]

Unlike common-law receivers, whose powers are given by the order of appointment, statutory receivers, being those authorized by statute in cases where a court of equity has not inherent power to appoint receivers, derive their powers from the statutes in pursuance of which they are appointed.[3] Not only must the statute be strictly followed in appointing the receiver,[4] but also in the exercise by the receiver of his powers.

A statutory receiver of a railroad, whose duties and powers are restricted to receiving the "rents, issues, profits and dividends" of the road, cannot lease it.[5] It may be stated as being well established that a statutory receiver can exercise only such powers as the statutes give. The order of the court cannot be broader than the statute.[6] The matter has thus been put: The powers of a court of chancery and the receiver appointed by it over insolvent railroads, are those expressly conferred by legislation, and those necessary to the exercise of the powers expressly conferred.[7]

A receiver appointed in proceedings commenced under the Mormon congressional act of 1887 was adjudged to represent both the government and the church corporation.[8]

Section 265. **The Receiver Holds the Property for the Benefit of all Parties Until After the Decree.**— Though a receiver may be and generally is, appointed upon the application of but one of the parties interested in the property which he is to preserve, his holding is not merely for the benefit of such party or of any other party; it is the holding of the court for the equal benefit of all persons who may be finally adjudged by the court to have rights in it.[9] Where, however, the rights of the parties are established he

[1] Runyon v. Farmers', etc., Bank, 4 N. J. Eq. (3 Green) 480.

[2] Knott v. Receivers, etc., 4 N. J. Eq. (3 Green) 423.

[3] See section 3.

[4] See section 48.

[5] State of Tennessee v. McMinnville & Manchester Railroad Co. 6 Lea, 369.

[6] Republic Life Insurance Co. v. Swigert, 135 Ill. 150; Thompson v. Greeley, 107 Mo. 577; Vanderbilt v. Central Railroad of New Jersey, 43 N. J. E. 669; Levey v. Bull, 47 Hun, 350.

[7] Vanderbilt v. Central Railroad of New Jersey, 43 N. J. E. 669.

[8] United States v. Church of Jesus Christ, 18 Pac. R. 85.

[9] First Nat. Bank v. E. T. Barnum Wire & Iron Works, 27 N. W. Rep. 657, 661 (Mich. 1886); s. c. 58 Mich. 315

is considered as holding for the benefit of the party entitled to the property.[1]

Upon a decree for the plaintiff, the receiver's duties, as such, are at an end, and he holds merely as his trustee. To entitle the plaintiff to the property, he should make a demand with a certified copy of the decree with his receipt on it.[2] In Rhode Island the court has decided that a receiver of a bank appointed under the Revised Statutes, c. 146, represents both the bank and its creditors, and that he can look behind its acts in the assertion of the rights of the creditors.[3]

Section 266. **The Rights of a Receiver in Taking Possession of the Property for Which He is Appointed.**— The power of a receiver to "take" property implies a correlative duty on the part of any one having it in possession to deliver it to him, and such holder violates the law in resisting the exercise of the lawful authority of the receiver. In such case the receiver may call upon the sheriff and his deputies to aid in enforcing his authority.[4] Where, prior to the appointment of the receiver the defendant, a corporation, had sold its property including its books, which had been delivered to the purchaser, it was held that the receiver could not take the books on summary order.[5]

A mortgagee has no equitable right growing out of his mortgage lien to have a receiver of the estate of the mortgagor beyond the property embraced in the mortgage; neither should the receivership be extended to other property in the possession of, and claimed by third persons.[6]

If a defendant is ordered by the court to pay over money to the receiver he must obey the order until he can have it reviewed by appeal or writ of error.[7] Where a draft may be payable in bills of the bank to a bank itself, it is also so payable to the receiver of the bank.[8]

Where a judgment in favor of the plaintiff is set aside and an order of restitution is allowed, it is no objection to the order that restitution is directed to be made to a receiver of the defendant,

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(1885); Delaney v. Mansfield, 1 Hog. 234.

[1] *In re* Colvin, 3 Md. Ch. 278.

[2] Very v. Watkins, 23 How. (U. S.) 469.

[3] Hayes v. Kenyon, 7 R. I. 136.

[4] State v. Rivers, 66 Iowa, 653, 656. In Iowa one who resists the receiver by refusing possession may by virtue of a statute, be indicted.

[5] Olmstead v. Rochester & Pittsburg Railroad Co. 46 Hun, 552.

[6] State of Florida v. Jacksonville, P. & M. R. R. Co. 15 Fla. 201, 280.

[7] Lutt v. Grimont, 17 Bradw. 308.

[8] Moise v. Chapman, 24 Ga. 249.

nor does the pendency of other actions in the circuit court of the United States by the receiver to recover the same money preclude the defendant from making the motion. Whether such a motion should be granted notwithstanding the pendency of such suits is discretionary with the court.[1]

Even the specific description of property in the order does not authorize the receiver to take it from the possession of a stranger to the action claiming to be a purchaser in good faith.[2] A receiver appointed of one railroad company is without power to take charge of another company's line operated in the same system.[3]

Section 267. **The Receiver's Right to Claim Property in Another State.**—Receivers appointed in other states may sue as such in the courts of New York, but not where their claims conflict with the rights of its citizens under its own laws, or work detriment to such of its citizens as have been induced to give credit to the foreign insolvents.[4] But a receiver appointed by a court or under a statute of that state, can not undertake to represent the creditor or creditors of the debtor in the courts of a foreign jurisdiction.[5]

In New Jersey a receiver appointed in a foreign jurisdiction, clothed with authority to take the designated property, wherever situate, may maintain a suit for the possession of such property in the courts of that state, but not if the suit contravenes the policy of the state as to its laws, or if it will invade or impair the rights of its citizens.[6] Such, also, is the law in Ohio.[7]

In Maine it has been held, that receivers appointed in another state, upon a decree for the dissolution of a corporation, can only have legal authority co-extensive with the jurisdiction of the court appointing them, and can not exercise their function in a manner detrimental to its citizens pursuing legal remedies there.[8]

Section 268. **The Powers and Rights of Receivers in Other States and Jurisdictions — Effect of Appointment on Property in such States and Jurisdictions — Rights of Creditors of Other States.**—A most important branch of the law of receiverships is the

[1] Market National Bank v. Pacific National Bank, 102 N. Y. 464, 467 (1886).

[2] Havemeyer v. Superior Court, 84 Cal. 327.

[3] Hook v. Bosworth, 12 U. S. C. C. App. 208; s. c., 64 Fed. R. 443.

[4] Pugh v. Hurtt, 52 How. Prac. 22, approving Runk v. St. John, 29 Barb. 585.

[5] Booth v. Clark, 17 How. (U. S.) 322.

[6] Hurd v. Elizabeth, 41 N. J. Law, 1, 4. To the same effect see Bank v. McLeod, 38 Ohio St. 174.

[7] Bank v. McLeod, 38 Ohio St. 174.

[8] Hunt v. Columbian Ins. Co., 55 Me. 290.

authority of receivers in states and jurisdictions other than those where the appointment is made, and the effect of the appointment upon property of the defendant therein.

The fundamental principle attending the subject of this section is that the orders and judgments of a court have no extra-territorial force, other than that given them by the national constitution and federal statutes, which is insufficient to affect property in or extend the powers of receivers to the jurisdiction of other states. The effect of the appointment of a receiver upon the property of the defendant in another state and the power and rights of the receiver there are founded solely on the principle of comity, which is a rule of courtesy and favor recognized and enforced between the courts of the several states, but which is never extended or enforced to embarrassment or loss to local creditors.[1] The topic may be elucidated and illustrated by presenting some of the adjudications concerning it.[2]

A receiver appointed in Illinois petitioned a court in Minnesota to set aside a judgment rendered by it, which was denied on the principle that the authority of the receiver did not extend beyond the limits of the state in which he was appointed.[3] "Strictly," said the court, "the statutory power of a foreign assignee or receiver cannot *ex proprio vigore* be recognized as having any force or effect here; but, by the comity existing between the states, which is recognized as a part of the common law, effect may be given to titles and powers derived from the laws of another state or country, by the courts of this state, where this can be done without contravening the laws or policy of this state, or interfering with the rights of creditors pursuing their remedies under our laws. * * * This application of the rule is sustained by the later and better decisions and by sound reason." This is a clear and correct statement of the prevailing doctrine, and is applicable to both common-law as well as to statutory receivers.

In Wisconsin it has been adjudged that the court of another state could not transfer to its receiver any property outside of its territorial jurisdiction; and that a receiver appointed in Illinois "acquired absolutely no right or interest in any property" owned by the defendant in Wisconsin.[4] In a later Wisconsin case there was

[1] See note 4, following.

[2] See further as to this subject chapter 20, concerning suits by receiver, section 687.

[3] Comstock v. Frederickson, 51 Minn. 350.

[4] Filkins v. Nunnemacher, 81 Wis. 95. In speaking of "judicial comity," the court said: "This phrase may mean little or much. It is as vague in meaning as it is pleasing in sound. The plaintiff is an officer of an Illinois court

in question the effect which would be given there of a proceeding in a New York court, in which the defendant corporation was dissolved, its creditors enjoined from suing it, and the title to all its property, effects and credits was vested in the receiver therein appointed. It was declared that the New York proceedings would be given full force and effect in Wisconsin, because of the principle of comity, as against a creditor residing in New York suing the corporation in Wisconsin and garnishing its creditors there.[1] It was said there was nothing in the proceeding or in the statutes of New York authorizing it " in conflict with or in connection with the laws or public policy of this state as declared by its statutes and the decision of its courts, nor does the present proceeding interfere or tend to interfere, or to prejudice the rights of any citizen of this state. * * * The case is, therefore, free from all objections which, by the general current of authority, might prevent or induce the courts of Wisconsin to refrain from giving, in a spirit of judicial inter-state comity, the same force and effect here to the proceedings in the supreme court of the state of New York in question as would be accorded to them there. There are many cogent reasons, in our judgment, why we should accord to them such effect upon principles of comity. * * * The tendency of recent adjudications is in favor of a liberal extension of inter-state comity, and against a narrow and provincial policy, which would deny proper effect to judicial proceedings in sister states under their statutes, and rights claimed by them, simply because, technically, they are foreign."

Where a receiver has taken possession of property, his right to retain possession and follow the property and recover it in all jurisdictions, and under all conditions, is well established.[2]

The federal court has had occasion to consider the right of a resident of the state where the receiver was appointed to go to another state and there subject property of the defendant to the payment of his claim. This was said: "An order appointing a receiver of

— a sort of a sheriff, with enlarged powers — armed with an equitable execution; the executive arm of the court in Illinois, which is to be extended in Wisconsin to grasp property here and transfer it to Illinois, and there account for it. Does judicial comity require that the Wisconsin courts should lend their active aid to such a proceeding? If so, then why should not the right to levy an execution within this state be extended to an Illinois sheriff by judicial comity? * * * Judicial comity goes to no such length."

[1] Gilman v. Ketcham, 84 Wis. 60.

[2] Humphreys v. Hopkins, 81 Cal. 551, dissenting opinion, which is supported by reason and the current of authority; Lewis v. Adams, 70 Cal. 403; Wilkinson v. Culver, 25 Fed. R. 639; Pond v. Cook, 45 Conn. 146; Merchants National Bank v. Pennsylvania Steel Co. 30 At. R. 545.

realty has no extra territorial force, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made.[1] Such orders, therefore, only operate *in personam* and upon those persons who are so related to the court, either as parties to the litigation, or by virtue of residence and citizenship, that they are bound to yield obedience to its orders."[2] It was said further that the doctrine that the courts of one state have authority over their own citizens to restrain them from prosecuting suits by attachment in a foreign jurisdiction against other citizens of the home state, in order to defeat local insolvent or exemption laws, does not extend so as to authorize the maintenance of a suit by a receiver to prevent litigation affecting the property of the receivership in another state; unless the parties proceeding against such property were parties to the litigation in which the receiver was appointed or in privity with such parties, or was otherwise subject to the jurisdiction of the court by virtue of his residence or citizenship; and that the rule then extended only to personal property.

Similar to the preceding case is one decided by the supreme court of Illinois.[3] A receiver was appointed in that state, the defendant having property in the District of Columbia, which was attached by the Meriden Britannia Company of Connecticut, the agent and representative of the company in Illinois making the affidavit and causing the suit to be instituted. The receiver commenced proceedings against the agent in Illinois to punish him for instituting the attachment suit and refusing to dismiss it, the supreme court sustaining the contempt proceedings. The court recognized the rule that the powers of a receiver are co-extensive only with the jurisdiction of the appointing court, and that he has no extra-territorial authority for official action. "But," said the court, "a receiver appointed in one state may, by comity, be permitted to recover the possession of property in another state, provided no citizen or suitor of the latter state is thereby prejudiced or injured. * * * It is true that the property attached is beyond the jurisdiction of the courts of this state, but the appellant, who caused it to be attached, is in this state and within the jurisdiction of its courts. If the superior court had no power to reach the goods in Newton's hands it had the power to reach appellant, who sought to prevent its receiver from getting possession of the goods. It makes no difference that the property was in a foreign jurisdiction."

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[1] Booth v. Clark, 17 How. 322.

[2] Schindelholz v. Cullom, 55 Fed. Rep. 885.

[3] Sercomb v. Catlin, 128 Ill. 556.

Neither the agent nor the company was either a party or privy to the receivership proceeding.

But the same court has declared that the suit of a citizen of the state in which the receiver was appointed, instituted in another state to subject property of the debtor there to the payment of his claim, would not be enjoined nor the suitor punished for contempt, unless he had knowledge of the receivership proceedings.[1]

The supreme court of Pennsylvania, through Chief Justice Agnew, has thus announced its views upon the right of a resident of the state where the receiver was appointed to subject property of the debtor located in another state to the payment of his claim: "As to these plaintiffs, who were citizens of Virginia, the appointment of a receiver was not extra-territorial. Then certainly they have no right after the appointment of a receiver by a court of their own state, binding on them there, to attempt to avoid its effect by escaping from its jurisdiction and coming here to ask us to infringe the comity we owe to the acts of their own courts within their jurisdiction. Instead of comity this would be unfriendliness, for they ask us to aid them in a violation of their own law. Our own citizens would be protected against the extra-territorial act in a proper case, because they are not bound by it, and our assistance given to the extra-territorial act, resting only in comity, would not be given at the expense of injustice to them. The case does not fall within the first clause, second section, of the fourth article of the constitution of the United States, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' As to a citizen of Virginia, the appointment of a receiver in Virginia, binding on him there, is not set aside by this clause of the constitution. The equitable transfer of the debt there is binding on him here."[2]

A receiver appointed in Pennsylvania was permitted to assert title to chattels in New Jersey, it being said by the court of the latter state that the order appointing the receiver vested in him all rights of the partnership, which would be recognized as there were no creditors of the firm in that state.[3]

The question as to the effect of an order appointing a receiver upon property out of the court's jurisdiction, and the power of a receiver thereover, has been elaborately discussed by the supreme

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[1] Holbrook v. Ford, 153 Ill. 633; s. c. 39 N. E. R. 1091; affirming s. c. 50 Ill. App. 547.

[2] Bagby v. Atlantic, Mississippi & Ohio Railroad Co. 86 Pa. St. 291.

[3] Gobernheimer v. Wheeler, 45 N. J. E. 614.

court of Texas.[1] The case arose because of the appointment by the federal court in Louisiana of a receiver of a railroad in Texas, which did not extend into the former state. The power of the federal court to make such an appointment was most emphatically denied, the doctrine being asserted and maintained that a court cannot confer on a receiver power to be exercised outside of its territorial jurisdiction; and that where the process of the court is without force its officers are also without power. The order of the federal court of Louisiana was declared to be void.[2]

The Louisville, Cincinnati & Lexington Railroad Company mortgaged its road bed and rolling stock. While a foreclosure proceeding was pending in Kentucky, the plaintiff, a corporation of the state of Kentucky, doing business in Louisville and within the jurisdiction of the court where the suit was pending, commenced its action at Cincinnnati, Ohio, against the railroad company and caused an attachment to be issued and levied on certain of its cars then in Ohio, which were included in the mortgage. Six days afterward the Kentucky court appointed a receiver in the mortgage proceedings. The receiver was ordered to take charge of and operate the railroad. It was held that the receiver took all the rights of the trustee under the mortgage and was, therefore, entitled to the possession of the cars; and this although the order of the Kentucky court did not operate to confer or divest any title to property outside of that state.[3]

A receiver was appointed of an insolvent corporation of New Jersey, which had contracted to construct a bridge in Connecticut. The receiver, on his appointment, took charge of the iron then in New Jersey and shipped it to New Haven to his address as receiver, for the purpose of carrying out and completing the contract for the benefit of the creditors of the company. It was held that, the property having been in the possession of the receiver when it came into Connecticut, he was invested with the right to it and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. It was said that the case would be different if the property had been in Connecticut when the receiver was appointed and he had never taken possession of it; that the court would inquire whether the receiver had possession of the property to the exclusion of rights of citizens of his own state, and that if such right existed it would be

[1] Texas and Pacific Railway Co. v. Gay, 86 Tex. 571; Pool v. Farmers' Loan and Trust Co. 7 Tex. Civ. App. 334.

[2] See section 21.

[3] Bank v. McLeod, 38 Ohio St. 174.

upheld in the foreign state; that it was not important whether the title to the property passed to the receiver or remained technically in the corporation, so long as the property was taken from the corporation and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation.[1]

A receiver of an insolvent corporation appointed in New Jersey to administer assets there was held to have no power to transfer to the jurisdiction of New York any question touching the distribution of such assets; that he could not deprive the court which appointed him of its authority over him and over the fund which he holds as its officer.[2]

Where by proper assignment the receiver held the legal title to certificates of corporation stock, it was adjudged that his right thereto in another state was greater than attaching creditors.[3]

A Pennsylvania court has said: "The principle deduced from the authorities is that, as between citizens of the state of the forum and assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter."[4] But citizens of a third state may sue out attachments and hold the property of the insolvent in a state other than the one in which the receiver was appointed because they are "within the words and spirit of the first clause of the second section of the fourth article of the constitution of the United States, that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."[5]

The same rule as to the rights of citizens of a third state has been followed in Ohio[6] and Indiana.[7] It was said in the Ohio case cited that, as a matter of comity between the states, foreign receivers are permitted to take property as against attaching creditors who reside within the jurisdiction of the court appointing the receiver. "Such claimants cannot go into a state and obtain an advantage by the

[1] Pond v. Cooke, 45 Conn. 126.

[2] Reynolds v. Stockton, 43 N. J. E. 211.

[3] Wheeler v. Pace Tobacco Co. 2 N. Y. Sup. 292.

[4] John Ray Clark Co. v. Toby Valley Supply Co. 3 Pa. D. R. 518.

[5] Id.

[6] President and Directors of the Manhattan Co. v. Maryland Steel Co. (Super. Court Cincinnati) 31 W. L. B. 100.

[7] Catlin v. Wilcox Silver Plate Co. 123 Ind. 477.

law of that state, which they could not obtain in their own, and courts cannot be used to that end. The adjudications are to the effect that if an assignment, or the custody, or ownership in property is valid in the state where made, it will be enforced in another state as a matter of comity, but not to the prejudice of the citizens of the latter, who may have demands against the assignor or custodian."

Where receivers of one state under their own contract, they carrying on the business of the insolvent corporation, were the owners and in possession of property in New Jersey, the supreme court of that state protected the receivers in possession of the property against citizens of a third state. "In the absence," said the court, "of any statute or policy requiring it to be otherwise done, the general rule of comity will prevail. The true rule of comity in such a case as here presented, is for our own courts to assist foreign receivers, appointed by and acting under the orders of the court of a sister state."[1] It was said that the rights of local creditors would be protected, but that creditors of a third state would not be permitted to use the process of the courts of New Jersey to obtain a preference over all other creditors.[2]

The Kentucky court of appeals has declared, that although a receiver of a corporation has been appointed in one state, yet this did not preclude the appointment of another receiver in another state of property of the corporation located there.[3]

The supreme court of Indiana has, in a case already cited in a note to this section,[4] considered the present subject at length, in which it was adjudged that a creditor had the right to go into a state other than that in which the receiver was appointed, and attach property of the debtor found there. It was said that the "power of a receiver is coextensive with that of the court which gives him official character;" that while a court may authorize its receiver to take possession of property in a foreign jurisdiction, "the doctrine," declared the court, "is universal that the appointment confers no legal authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment, of its own force, gives him the right to take possession of the property, but it confers upon him no power

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[1] Merchants' National Bank v. Pennsylvania Steel Co. 30 At. R. 545.

[2] This is contrary to the proposition announced in John Ray Clark Co. v. Toby Valley Supply Co. 3 Pa. D. R. 518, and President and Directors of the Manhattan Co. v. Maryland Steel Co. 31 W. L. B. 100, cited *supra*.

[3] Schmidt v. Mitchell, 33 S. W. R. 408.

[4] Catlin v. Wilcox Silver Plate Co. 123 Ind. 477.

to compel the recognition of that right outside the jurisdiction of the court making the appointment. While there are authorities of great weight which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine upon which all the decisions seem to be harmonious is, that upon the principles of comity the courts of the jurisdiction in which the property or fund is situate, will recognize the rights of the receiver so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors. * * * The rule may be considered as established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who were parties to, or in some way in privity with the proceedings in the course of which his appointment was made, or who are in possession of the property or fund to which the receiver has a right, and not against creditors of a non-resident debtor, who are seeking to subject the property or fund to the payment of their debts, by proceedings duly instituted for that purpose. * * * The available legal authority of a receiver is coextensive only with the jurisdiction of the court by which he was appointed, when the right of precedence or priority of creditors is asserted in respect of property or funds of a non-resident debtor which the receiver has not yet reduced to his possession."

From the authorities and the principles attending the subject of this section the following propositions may be logically deduced:

1. The powers of a receiver are coextensive only with the territorial jurisdiction of the court appointing him and whose officer he is. This rule applies to different judicial districts in the same state, as well as to jurisdictions of different states, in the absence of statutory authority.

2. But because of the principle of "judicial comity," a phrase of well defined and accepted meaning, a receiver of one state or jurisdiction will be recognized and permitted by the courts of another to do all that is necessary to take and possess the property of the debtor there located, provided that to do so will not violate any law or policy of the latter, or embarrass or do injustice to any of its citizens, or those of a third state who have come there to enforce the payment of their claims against the debtor.[1]

[1] Winans v. Gibbs & Starrett Manufacturing Co. 48 Kans. 777; Chandler v. Siddle, 3 Dill. 477; Dunlop v. Paterson Fire Insurance Co. 12 Hun. 627; Dyer

3. Except as stated in the preceding proposition the order of appointment has no effect on property without the jurisdiction of the court.[1] It constitutes only an equitable assignment, enforceable under the conditions stated.

4. A citizen of the state where the receiver was appointed cannot evade the effect of the order by going into another state and seizing property of the debtor there located. And it is the opinion of the author that this is true whether or not such person is a party or privy to the receivership proceeding, and that the rule is applicable to both real and personal property. Want of information of the receivership proceeding would be a sufficient defense to a contempt proceeding, but we do not perceive on what principle it would permit the prosecution of the foreign suit.

Section 269. **Right to Exercise His Own Discretion.** — The rules of the English court of chancery were formerly strict in not allowing a receiver to do many things, such, for instance, as making leases, or even repairs, without a previous approval of a master. But courts frequently sanctioned such acts performed by him without express direction, as they would have directed to be done upon formal application; from which circumstance has developed the present practice of allowing receivers to use their own discretion in many matters connected with the care and management of the property entrusted to them, subject, however, to the control and approval of the court. Such approval may usually be had if it appear that the receiver acted in good faith and for the benefit of the parties in interest.

Upon this principle it has been held that when receivers have advertised for proposals for leasing property, they may exercise a wise discretion in accepting or rejecting bids, and that their advertisement does not constitute such a contract with the bidder as will compel them to take the highest bid or limit them to a certain time within which to receive bids. In this case the court refused the application of an unsuccessful bidder to compel the receivers to execute a lease to him, it appearing that they had acted prudently

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v. Power, 14 N. Y. S. 873; Boulware v. Davis, 90 Ala. 207; Holbrook v. Ford, 153 Ill. 633; Hunt v. Gilbert, 54 Ill. App. 491; Lett v. Thurber-Wyland Co. 15 Pa. C. C. R. 666; Stockbridge v. Beckworth, 6 Del. Ch. 72; Ogden v. Warren, 55 N. W. (Neb.) 221; Bidlack v. Mason, 26 N. J. E. 230.

[1] Day v. Postal Telegraph Co. 6 Cent. R. 441 (Md. Ct. App.); Wiswall v. Lampson, 14 How. 52; Barton v. Barbour, 104 U. S. 126; Amy v. Manning, 149 Mass. 487.

and with regard to the best interests of the trust property in accepting a lower bid.[1]

Where a receiver of a hotel, who was carrying on the business, cashed a check for a guest, it was held to be a prudent exercise of discretion and that the receiver was not liable for the loss occasioned by the check being dishonored.[2]

Section 270. **The Application of the Funds and Making of Contracts not Matters of Discretion.**—But a receiver is not allowed to exercise his discretion in applying the funds in his hands. These he holds strictly subject to the direction of the court, and only to be disposed of upon its order.[3] Neither can he enter into contracts without the approval of the court.[4] Although, as receiver, he may enter into negotiations and make such agreements as would be binding upon him as an individual, yet, in order to affect the fund in his hands, his acts must be ratified by the court. This rule is so well established that it has been decided that all persons contracting with a receiver are chargeable with knowledge of his inability to contract, and enter into contracts with him at their peril,[5] and that the court has unquestioned power to modify or even vacate his agreements.[6] Such power will not be exercised, however, except after notice to the persons contracting with the receiver and upon hearing.[7] But it seems from a late decision in New Jersey, hereafter more fully noticed,[8] that the receiver of an insolvent railroad corporation may contract for labor and necessary supplies to enable him to perform the duties of his trust, and that such contracts will be enforced against the trust.[9]

Section 271. **Of the Receiver's Right to Originate Proceedings.**—It was formerly the rule that a receiver ought not to make application directly to the court, but, in circumstances of difficulty, should apply to the plaintiff to make it, and only on his default should he be considered as properly applying to the court.[10]

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[1] Knott v. Receivers of Morris Canal, etc., Co. 4 N. J. Eq. (3 Green) 423.

[2] Heffron v. Rice (Ill.), 36 N. E. R. 562.

[3] Johnson v. Gunter, 6 Bush. 534; Adams v. Woods, 15 Cal. 206; Blunt v. Clitherow, 6 Ves. 799; Attorney-General v. Vigor, 11 Ves. 563; Penn v. Whiteheads, 12 Gratt. 74.

[4] Text approved in Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554.

[5] Ellis v. Little, 27 Kan. 797; Tripp v. Boardman, 49 Iowa, 410.

[6] Mooney v. British Commercial Ins. Co. 9 Abb. Pr. (N. S.) 103.

[7] Ibid.

[8] See next chapter.

[9] Lehigh Coal & Nav. Co. v. Central Railroad Co. 41 N. J. Eq. 167, 175 (1886).

[10] Parker v. Dunn, 8 Beav. 497.

In a leading English case the court held that a receiver ought not to present a petition or originate proceedings in the cause; that any necessary application ought to be made by the parties to the suit; but that there may be exceptions to the rule, as where a receiver has incurred costs in the execution of his duties, for which the parties have long neglected to provide — a case where he would be justified in presenting a petition for their payment.[1]

In the Irish court of chancery this rule of practice has been frequently applied, as when it refused to allow a receiver to let lands under his control because the motion should not have been made by him, but by the plaintiff in the cause;[2] so also where a receiver's motion for leave to bring an action in ejectment against one of the defendants was denied on the ground that it was not his duty to carry on the plaintiff 's cause upon a question involving the rights of the parties;[3] and again, where, upon the application of a receiver for instructions concerning the payment of a mortgage upon lands held by him, the court refused to instruct for the reason that the application should have been made by the parties and not by the receiver.[4] It is well settled, however, in this country that the receiver, as the officer of the court, is entitled to ask for and receive the advice and instruction of the court upon all questions of difficulty or importance, as will be shown hereafter.[5]

Section 272. **The Receiver's Right to Apply to the Court for Instructions.**—A receiver has a right, on his own motion, to apply to the court for instructions in relation to the funds, when a question arises as to what may be his duty under its orders.[6] This right grows naturally out of the fact that he is an officer of the court and subject to its direction, and is charged with responsible and often embarrassing duties.[7] He is entitled to advice from the court upon all questions of difficulty or intricacy, and may make application for it on all suitable occasions without hesitation.[8] It

[1] Ireland v. Eade, 7 Beav. 55; s. c. 13 L. J. (N. S.) Ch. 129. See also Courand v. Hamner, 9 Beav. 3.

[2] Wrixon v. Vize, 5 Ir. Eq. 276.

[3] Comyn v. Smith, 1 Hog. 81.

[4] O'Connor v. Malone, 1 Ir. Eq. 20, and see Callaghan v. Reardon, Sausse & S., 682; Clark v. Fisher, Id. 684.

[5] See following section.

[6] Curtis v. Leavitt, 1 Abb. Pr. 274; Grant v. Phœnix Life Insurance Co. 121 U. S. 118; Schwartz v. Keystone Oil Co. 153 Pa. 283; Sullivan v. Miller, 106 N. Y. 635; Weeks v. Weeks, 106 N. Y. 626; People ex rel. Attorney-General v Security Life Insurance and Annuity Co. 79 N. Y. 267,

[7] Matter of Van Allen, 37 Bark. 225.

[8] Smith v. New York Consolidated Stage Co. 18 Abb. Pr. 431; s. c. 28 How. Pr. 377; Curtis v. Leavitt, 1 Abb. Pr. 274; Lottimer v. Lord, 4 E. D. Smith, 191; Matter of Van Allen, 37 Barb. 225; People v. Security Life Ins.

has been more forcibly said that he is bound in all cases of doubt, and especially of conflicting interests or claims, to take the direction of the court.[1]

The application for the instruction of the court may be made without notice to the parties interested in the fund in the receiver's hands, although where there is no necessity for immediate action it would seem to be the better practice not to apply *ex parte*.[2] In granting such an application the court may, if such action be necessary to enable the receiver to perform his duties or to protect him in discharging them, enlarge the powers originally given him by the order of his appointment.[3]

Receivers "can have general advice and instructions, and, in particular cases, particular advice and instructions on application to the court. The value of such advice depends. If there are parties in interest, and they have their day in court, the advice may be decisive; but, if the matter is *ex parte*, the value of the advice of the judge depends largely upon the information and ability of the judge, and is probably binding only on the receivers; for the judge may change his mind on hearing full argument."[4]

Section 273. **He is at All Times Subject to the Control of the Court.**—A court of equity possesses the power to make all necessary orders for the control of receivers appointed by it.[5] The legislature has no power to compel a receiver of one bank to receive bonds issued by the state to another bank in payment of the debts of the latter.[6] When necessary the court may enlarge the powers originally granted to him.[7] This power of the court over its receivers has been exercised to control them in the settlement of demands against the property held by them, it being a duty resting upon the court to compel the settlement of such claims expeditiously and without unnecessary litigation or expense to the fund.[8] Orders of court for the direction of receivers are to be

Co. 79 N. Y. 267, 270; Cammack v. Johnson, 2 N. J. Eq. (1 Green) 163.

[1] Lottimer v. Lord, 4 E. D. Smith, 191.

[2] Smith v. New York Consolidated Stage Co. 18 Abb. Pr. 431; s. c. 28 How. Pr. 377.

[3] Ohio Turnpike Co. v. Howard, 1 West L. J. 216. See also Jennings v. Simpson, 12 Neb. 558, as to the general power to make necessary orders.

[4] Missouri Pacific Railroad Co. v. Texas Pacific Railroad Co 31 Fed. Rep. 862.

[5] Jennings v. Simpson, 12 Neb. 558, deciding also that, in Nebraska, this power is not limited by the provisions of § 602 *et seq.* of the code of that state; Guardian Savings Institution v. Bowling Green Savings Bank, 65 Barb. 275.

[6] Peay v. Ramsey, 21 Ark. 91.

[7] Ohio Turnpike Co. v. Howard, 1 West. L. J. 216.

[8] Guardian Savings Institution v. Bowling Green Savings Bank, 65 Barb. 275.

strictly obeyed by them.[1] So it has been held that where a receiver was expressly authorized, for the purpose of constructing a railway, to issue certificates "for money borrowed, material furnished, labor performed, or on account of contracts made by him for or on account of the construction or completion of said road, or any part thereof," he had no implied powers other than those derived from the order of the court, and not until the material was furnished or labor performed was he authorized to issue certificates in payment therefor. If the necessity exists for enlarged powers they should be applied for.[2]

Section 274. **Of the Power to Employ Counsel — Compensation and Selection Of.**—While the receiver, as an officer of the court, may apply directly to it for instruction as to his duty in the care and management of the property entrusted to him, it is now the established practice to allow him to employ counsel, in order to avoid the necessity of frequent applications to the court for advice upon points of law.[3] In a very recent case it was said that a receiver has a right to employ counsel to advise him as to the management of the property placed in his hands, and as to his duties in the premises, the fees for such services constituting a proper charge to be paid out of the funds in his hands.[4]

In New York it has been stated to be the rule that, although in cases presenting difficult questions a receiver, instead of taking up the time of the court with frequent applications for instruction, may and should apply to his own counsel, yet this should be done either with the sanction of the court or at the expense of the receiver. So, in a case where no authority to employ counsel was asked for or given, and no necessity for such employment appeared from the evidence, the court refused to allow a claim upon the fund for counsel fees.[5] Although a lawyer who is appointed a receiver may use his professional knowledge in executing the trust, he will not be allowed counsel fees therefor, since his commissions are considered as full compensation for all his services.[6]

The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver[7]

[1] Ibid; Herrick v. Miller, 123 Ind. 304.

[2] Montreal Bank v. Chicago C. & W. R. R. Co. 48 Iowa, 518, 524.

[3] Clapp v. Clapp, 49 Hun, 195.

[4] Hubbard v. Camperdown Mills, 1 South East. Rep. 511. (Sup. Ct. of S. C., 1886.)

[5] Corey v. Long, 12 Abb. Pr. (N. S.) 427, 443; s. c. 43 How. Pr. 492. See also Lottimer v. Lord, 4 E. D. Smith, 191.

[6] Matter of Bank of Niagara, 6 Paige, 213.

[7] Section 39.

operate also to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his client, will, in most cases, if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties, such as cannot be properly performed by one person.[1]

This rule, prohibiting a receiver from employing the solicitor of either of the parties to the suit in which he is appointed, is intended to protect the rights of all the parties; and if they do not object, the receiver may employ the solicitor of either party to aid him in the discharge of his trust;[2] and a mere stranger to the suit has no right to object that the solicitor of one of the parties to the original suit was employed by the receiver to institute a suit against him.[3]

So far as this rule rests upon the diversity of interest of the parties it has been modified by the courts in such a way that a receiver may without impropriety be represented by the attorney of a party, unless the interests of the receiver and such party are adverse.[4] In a late case, the court, referring to the decision last cited in which this position was taken, said: "The general rule that a receiver should not employ the counsel of either of the parties to a litigation in which he is appointed, is subject to certain limitations. It is only when the receiver is acting adversely to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other."[5]

It has also been decided that a receiver who was counsel for an administrator being one of the parties to the action, could not be allowed to retain his fee as such counsel out of the share of the funds in his hands.[6] So, too, it has been considered proper that counsel for creditors should be employed by a receiver appointed in a suit brought to set aside fraudulent sales, because of his familiarity with the proceedings.[7]

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[1] Adams v. Woods, 8 Cal. 306, 320; Matter of Ainsley, 1 Edw. Ch. (N. Y.) 576; Ray v. Macomb, 2 Edw. Ch. (N. Y.) 165; Ryckman v. Parkins, 5 Paige, 543; Merchants & Manufacturers' Nat. Bank v. Kent, Circuit Judge, 43 Mich. 292, 297; Wilson v. Poe, 1 Hog. 322; Moore v. O'Loghlin, 3 L. R. (Ir.) 405; Blair v. St. Louis H. & K. R. R. Co. 20 Fed. Rep. 348.

[2] Warren v. Sprague, 11 Paige, 200; Corey v. Long, 12 Abb. Pr. (N. S.) 427, 435; s. c. 43 How. Pr. 492.

[3] Warren v. Sprague, 11 Paige, 200.

[4] Smith v. N. Y. Consolidated Stage Co. 18 Abb. Pr. 419; s. c. 28 How. Pr. 277.

[5] Hynes v. McDermott, 3 N. Y. St. Rep. 582, 585. (N. Y. Com. Pl. Genl. Term, 1886.)

[6] Battaille v. Fisher, 36 Miss. 321.

[7] Shainwald v. Lewis, 8 Fed. Rep. 878.

Upon an appeal from an order vacating an *ex parte* order requiring a judgment debtor to appear and be examined in supplementary proceedings, which order was made after the property of the plaintiff had been placed in the hands of a receiver, and by the same attorneys who had obtained the judgment, it was urged on behalf of the appellant that, inasmuch as the receiver had not been substituted for the plaintiff, he could not take the case out of the hands of the plaintiff's attorneys, but the court overruled the objection on the ground that the authority of the plaintiffs attorneys ceased upon the entry of the judgment and that subsequently the receiver could employ another attorney without substitution.[1]

While it is entirely proper for a receiver to employ counsel, the engagement, like all acts of the receiver, will be subject to the approval of the court, and it will determine and name the compensation and determine whether the selection was proper.

It has been said that it is the duty of the receiver to select "a person to act as his legal adviser, where that may become a necessity, who has not been identified with the legal business of either of the parties to the action. This rule is, however, subject to the qualification that, where the employment is made in good faith with the assent of the parties, it will escape the condemnation or censure of the court."[2]

The court of chancery of New Jersey has thus spoken of the subject: "In this case application has been made for the court to name a counsel for the receiver, and also to determine whether or not the counsel so appointed shall also be the solicitor of the receiver, or whether it will be proper for the solicitors of the complainant, who filed the bill, to act as solicitor of the receiver. I have not the slightest doubt of the duty of the court to appoint counsel for the receiver nor of the right of the receiver to select counsel; and it is equally clear that when it is proper for the court to appoint, or the receiver to select counsel, the same considerations must demand the selection of an independent solicitor. * * * It is the right of the receiver to have his own counsel; and it is the plain duty of the court to appoint an independent counsel for him, whether he asks for it or not, in case the court sees the slightest necessity therefor.

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[1] Moore v. Taylor, 40 Hun 56 (N. Y. Sup. Ct. 1886), citing Lusk v. Hastings, 1 Hill, 656; Eagan v. Rooney, 38 How. Pr. 121, and distinguishing Glenville Woolen Co. v. Ripley, 43 N. Y. 206, in which case the receiver of the plaintiff was appointed after the commencement of the action, and when the suit was begun the plaintiff was the owner of the demand on which he sued.

[2] Clapp v. Clapp, 49 Hun. 195.

This results from the fact that the court is supposed to have the entire control of the affairs of every such insolvent corporation, and the receiver is only the agent of the court." [1]

But it has been declared that "the general rule, that a receiver should not employ the counsel of either party to the litigation in which he is appointed, is subject to certain limitations. It is only when the receiver is acting adversely to one of the parties that it has ever been supposed there was any impropriety in employing the counsel of the other." [2]

The right of a receiver to employ counsel was recently recognized by the supreme court of Alabama, but, as the court put it, "upon the more liberal rule which generally obtains in reference to administration trusts, that, if a receiver, without previous authority, but upon his own responsibility, incurs an expense in the discharge of his duties, which he shows to have been necessary, and such as the court would have authorized if application had been made in advance, to accord him the like indemnity which would have been accorded if the previous authority had been obtained." [3] But it was asserted that the receiver had no authority to employ counsel to perform any duty other than a professional and skilled one. "The custom," said the court, "of receivers employing counsel upon the theory that they are to have all they can induce the court to pay, rather than to employ counsel for the best interests of the estate and without the effort to obtain the best terms practicable, is fraught with evil and should not be encouraged."

Though a receiver may be sued in another court, with leave of the appointing court, yet the former cannot determine matters which are within the discretion of the latter court; and this includes the determination of compensation of receiver's counsel,[4] which the appointing court, not the receiver, must fix.[5]

The authority of a receiver to employ counsel does not permit the receiver to determine or pay the latter's compensation, without the order of court.[6]

Section 275. **The Power to Appoint Deputies and Employ Assistants.**— A receiver of partnership property has no power, except

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[1] Emmons v. Davis & Dowd Pottery Co. 16 At. R. 157.

[2] Hynes v. McDermott, 14 Daly, 104; Smith v. Consolidated Stage Co. 28 How. Pr. 377.

[3] Henry v. Henry, 15 So. R. 916; International and Great Western Railroad Co. v. Herndon (Tex. Civ. App.) 33 S. W. R. 377.

[4] International and Great Northern Railroad Co. v. Herndon (Tex. Civ. App.), 33 S. W. R. 377.

[5] Walsh v. Raymond, 58 Conn. 251.

[6] Id.

by special order of the court, to appoint a deputy receiver, to be paid out of the fund in his hands; but he may appoint a competent person to take charge of and wind up the business and a reasonable number of keepers for the protection of the property, and pay them out of the fund a reasonable compensation.[1] If the estate over which the receiver is appointed be at a distance, he may appoint his own agent.[2] So, also, if he needs assistance in removing the property of which he is entitled to the possession, he may employ such as is necessary, at the expense of the fund in his hands.[3] If he be empowered to continue the business over which he is appointed, he may employ such persons as may be necessary for this purpose, and the court will not interfere with his discretion in this respect, unless some abuse is shown.[4] The responsibility for the selection of proper employees rests on the receiver.[5]

As a general rule, an agent engaged by a receiver must look to him individually for his compensation, which will be allowed by the court out of the estate on a showing of a necessity for the employment.[6]

A receiver has no authority to employ a stenographer when such assistance is unnecessary.[7]

In a late case in New Jersey it was held that, "the receiver of an insolvent railroad corporation has authority, as a thing necessarily incident to the duties imposed upon him, to make all such contracts for labor and supplies as are reasonably necessary to enable him to perform the duties of his appointment, and that his contracts for such purposes bind the trust."[8]

It has been said that a court should protect its receiver through its officers, and that the receiver had no right to employ detectives to protect him, and that such action should not be sanctioned.[9]

Section 276. **Of the Receiver's Right to the Protection of the Court.**— The receiver is entitled to the protection of the court.[10] The possession of a receiver is not to be disturbed without leave of

[1] Corey v. Long, 12 Abb. Pr. (N. S.) 427, 441; s. c. 43 How. Pr. 492.

[2] Blank v. Lindsay, 15 Ves. 91.

[3] Dickerson v. Van Tine, 1 Sandf. Super. Ct. 724.

[4] Taylor v. Sweet, 40 Mich. 736.

[5] Frank v. Denver & Rio Grande R. R. Co. 23 Fed. Rep. 757, 764.

[6] Davis v. Stover, 16 Abb. Pr. (N. S.) 225.

[7] Chandler v. Cushing-Young Shingle Co. (Wash.) 42 Pac. R. 548.

[8] Lehigh Coal & Nav. Co. v. Central R. R. Co. 41 N. J. Eq. 167, 175 (1886).

[9] American Trust and Savings Bank v. Frankenthal, 55 Ill. App. 400.

[10] American Trust & Savings Bank v. Frankenthal, 55 Ill. App. 400.

the court.[1] Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect such possession, not only against violence, but also against suits at law. But if the property is in the possession of a third person, under the claim of title, the court will not protect the officer who attempts, by violence, to obtain possession, any further than the law will protect him, his general authority being unquestioned.[2]

It was said by Lord Romilly, M. R.: "I apprehend this is clear, that the court never allows any person to interfere either with money or property in the hands of its receiver, without its leave; whether it is done by the consent or submission of the receiver or by compulsory process against him. The court is obliged to keep a strict hand over property in the hands of a receiver, or which, by virtue of the order of the court, may come into his hands, in order to preserve entire jurisdiction over the whole matter, and to do that which is just in the cause between the parties." [3]

Where a receiver is in possession of real estate which is subject to the lien of a judgment, the sale of the premises by the sheriff, upon an execution on such judgment, does not disturb the possession of the receiver, and the sheriff cannot, therefore, be proceeded against for a contempt in making such sale. But the purchaser cannot disturb the possession of the receiver when he obtains his conveyance from the sheriff, without the permission of the court.[4]

Where a railway company, without the leave of the court, took proceedings, under a statute, to take possession of lands in possession of a receiver, it was restrained on an *ex parte* motion.[5] And a writ of assistance, directed to the sheriff of the county where the lands are situate, may, in some extreme cases, be obtained; but for this purpose, it must satisfactorily appear that the receiver can not, without such extraordinary aid, execute his office.[6] In Ireland it has been held in a case where a tenant had rescued a distress made by a receiver to enforce payment of rent, that, as the receiver was proceeding by a common law remedy, he could have no remedy for the rescue except at common law; but the master of rolls added: "Had this tenant used any violence

[1] Brooks v. Greathead, 1 Jac. & Walk. 178.

[2] Parker v. Brown, 8 Paige, 388; Noe v. Gibson, 7 Paige, 513.

[3] De Winton v. Mayor of Brecon, 28 Beav. 200, 203. See, generally, Day v. Postal Telegraph Co. 6 Cent. Rep. 441. (Ct. of App. Md. 1887.)

[4] Albany City Bank v. Schermerhorn, 9 Paige, 372.

[5] Tink v. Rundle, 10 Beav. 318.

[6] Green v. Green, 2 Sim. 394, 430.

towards the receiver, or threatened to use any, I would attach him, but not otherwise."[1]

Section 277. **The Same Subject Continued — Strikes.** — A federal court has ruled that where the employees of a railroad company whose property is in the custody of the court, by concert of action, quit work and take possession of and obstruct the movement of engines and cars on the tracks of the company, and, while so doing, also take possession of, or obstruct the operation of engines or cars in the custody of the receivers, it is the right and duty of the court to punish the latter acts by proceedings in contempt. If, however, they are engaged in a lawful undertaking and the interference is not intentional, the court will not be tenacious of its prerogative; otherwise, if the undertaking be unlawful, even if they intend no contempt.[2] In this connection the Hon. Francis Wharton says: "The receiver is as much an officer of the court as is an officer appointed by the court to summon witnesses or to execute final process. Resistance in the first case is as much an obstruction of the process as is resistance in the last two cases. It may be objected that this bears with unnecessary harshness on persons ignorantly impeding the action of the receivers in a case such as the present. The same objection, however, applies to all other cases of resistance of process, and if the objection were held good, no process whatever could be enforced against parties who are so stupid or so angry as not to understand what is the nature of the authority which they resist."[3] In a later case another federal court held that receivers are entitled to, and must have, the full protection that the court can give under the laws of the land, whether the grievance comes from within or without, and that it is immaterial whether the interference comes in the way of actual violence or by intimidation and threats.[4]

Section 278. **The Power to Compromise Disputed Claims Against the Fund.**—The authority of the court to control its officers and to care for the property in his hands as representing the court, is ample to authorize a receiver to compromise disputed and doubtful claims against the fund, by the allowance of so much of such claims as he may deem just and equitable, and also to compromise with debtors of the corporation who are unable to pay

[1] Fitzpatrick v. Eyre, 1 Hog. 171.

[2] *In re* Doolittle, 23 Fed. Rep. 544 (1885).

[3] *In re* Doolittle, *supra*, note, pp. 549, 551.

[4] *In re* Higgins, 27 Fed. Rep. 443 (1886). See also section 350.

in full, upon the receipt of such part of the debts due from them as he shall deem reasonable and for the best interest of all parties.[1]

It was recently held in New Jersey that an agreement made between the receiver of a corporation and the general assignee of one of its creditors for the compromise of its debt due to said creditor, which agreement was ratified by the court, is to be regarded as a novation creating a new obligation between the receiver and the assignee, and that the claims of resident attaching creditors of the assignor based upon the policy of that state in respect to assignments giving preferences, which claims were not asserted until after the receiver had become liable to the assignee on said agreement, cannot avail against that agreement.[2]

Section 279. **An Advantageous Settlement of a Claim, Although Made Without Express Authority, Will be Approved.**—Where certain persons who had, by the illegal acts of the managers of a bank, received from them government bonds and moneys belonging to it, and, after disposing of them, had become insolvent, and the receiver of the bank, in consideration of the payment to him by them of a large sum of money, settled with such persons all matters of difference between them and the bank, transferring to them his title to the bonds and thereby secured to the bank and its depositors pay for a large share of the funds thus illegally disposed of by the managers, it was held that this was a proper exercise of discretion by the receiver; that the receiver by entering into this agreement did not relieve the managers from their liability for their illegal acts in disposing of the bonds and moneys, nor did he by so doing ratify these acts of the managers, and was not thereby precluded from making them answer for such acts.[3]

Section 280. **A Receiver Cannot Ordinarily Purchase or Bid at a Sale of the Estate.**—The rule as to the right of a receiver to bid or purchase at a sale of the property committed to his keeping

[1] Matter of the Croton Insurance Co. 3 Barb. Chan. 642.

[2] Kimball v. Lee, 4 Cent. Rep. 332 (N. J. Ch. 1886); s. c. 2 Atl. Rep. 820.

[3] Wilkinson v. Dodd, 2 Cent. Rep. 245 (N. J. Ch. 1886). In the opinion in this case Bird, V. C., said: "By the action of the receiver, the depositors have over $800,000 added to the fund for distribution, and the managers, if liable for the alleged negligence, have such liability lessened to that extent. Had the receiver failed to avail himself of this offer, he would have been guilty of the grossest negligence. * * * I think he was under the highest obligations to do what he did, and I believe every equitable tribunal will sustain him." This decision was affirmed by the court of errors and appeals *sub nom*, Dodd v. Wilkinson, 5 Cent. Rep. 100 (1886).

is well settled. It has long been the rule, as stated in an Irish case concerning a landed estate, that it is contrary to the practice and policy of a court of equity to permit the receiver in a cause to bid at the sale of the lands over which he has been appointed. But the Master of the Rolls added: "I do not, however, say that very peculiar circumstances may not justify the court in departing from what I conceive should be the general rule, namely, not to permit the receiver to bid at a sale of the estate."[1]

This rule is founded upon strong grounds of public policy and upon the peculiar relation of the receiver to the property as being an officer and representative of the court. There should be no relation existing between him and the fund inconsistent with the duty and obligation which he owes to the court and to the parties interested in the property. So it was said, in a New York case, by Johnson, J.: "It is hardly possible to state the rule of equity too broadly or too strongly. It will not permit a trustee to subject himself to the temptation which arises out of the conflict between the interest of a purchaser and the duty of a trustee. It was Miller's duty as receiver to make the property bring the highest possible price, but as purchaser this was not his interest. The rule is entirely independent of the question whether, in point of fact, any fraud has intervened. It is to avoid the necessity of any such inquiry, in which justice might be balked, that the rule takes so general a form."[2]

It has been correctly said that "a receiver is regarded as occupying a fiduciary relation, in the sense that he cannot be allowed to purchase for his own benefit property connected with or forming part of the subject-matter of his receivership, or in his possession in that capacity. * * * It denies the receiver the privilege of becoming a purchaser of property pertaining to his trust, entirely independent of the question of whether any fraud intervened." The purchase by the receiver of the mortgaged property in his possession was declared to be void.[3]

Nor can a receiver, before the sale of the property, contract with an intending purchaser to become interested with him therein.[4] Courts will not permit a receiver any more than any other trustee

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[1] Anderson v. Anderson, 9 Ir. Eq. 28.

[2] Jewett v. Miller, 10 N. Y. 402, 404. See also Carr v. Houser, 46 Ga. 477; Titherton's Adm'r v. Hodge, 81 Ky. 286; Alven v. Bond, Flan. & K. 196; s. c. 3 Ir. Eq. 365; Eyre v. McDonnell, 15 Ir. Ch. (N. S.) 534.

[3] Herrick v. Miller, 128 Ind. 304.

[4] Penzel Grocer Co. v. Williams, 58 Ark. 81.

to subject himself to the temptation arising from the conflict between the interest of a purchaser and the duty of a trustee.[1]

A receiver cannot become a mortgagee of the receivership property.[2]

Section 281. **The Same Subject Continued — Exception.** — As stated above, the question as to whether any fraud is or is not intended by the receiver purchasing at such a sale, does not affect the rule. The general rule has been applied in a case where the receiver represented a bank owning the equity of redemption in certain mortgaged property which was sold under the mortgage and at which sale he became the purchaser. It was held that he could not take the title, though the sale was a judicial one, under a decree against the receiver upon a title paramount to his and to the interest of the bank whose property he had as a receiver.[3] So in a case where the receiver purchased at a sale of the property of the receivership, without the sanction of the court or the consent of the parties interested, and in such a way as to conceal the fact from both the court and the parties, the sale was set aside even after it had been confirmed by the court.[4] And when a receiver had purchased an annuity charged upon the property in his hands, for a price much less than its value, the sale was rescinded upon the application of the personal representatives of the vendor.[5] But even this rule, so rigidly enforced, has found an exception in a case in which the receiver, having obtained the consent of all the parties interested in the lands in controversy, was permitted to become the tenant of the lands, it appearing to the court that such a course was beneficial to the estate and to all concerned in it.[6]

Section 282. **A Receiver Should Not be Interested in Any Claim Against the Estate.**—Where, in pursuance of a stipulation entered into by the interested parties, an order was entered closing the affairs of an estate, which was in the hands of a receiver, by distributing all the funds in his hands among creditors and claimants, excepting for a claim in litigation, in which the order directed that the receiver should retain certain moneys with which to settle the claim, and provided that he might retain the residue, if any, as additional compensation for his services, and from the finding

[1] Thompson v. Holladay, 15 Oreg. 84.
[2] Id.
[3] Jewett v. Miller, 10 N. Y. 402.
[4] Alven v. Bond, Flan. & K. 196.
[5] Eyre v. McDonnell, 15 Ir. Ch. (N. S.) 534.
[6] Stannus v. French, 13 Ir. Eq. 161.

by the court of the amount due upon said claim, the receiver appealed, it was held that he had no right to contest the allowance of the claim, and that the interest of the receiver in the claim as provided in the order, was inconsistent with the impartial performance of his duty as receiver. McAllister, J., said: "A receiver is an officer of the court, and has been figuratively styled the hands of the court. With that figure in mind, this case appears very much like a mild rebellion of the hands against the head."[1]

Section 283. **Receiver's Powers in Paying Out Money and to Deliver Property—Distribution.**—As a general rule a receiver should not pay out any money without an order of court, either general or special, authorizing or directing him to do so.[2] But there may be cases in which he may take upon himself to make payments without an order;[3] and he will not be denied reimbursement in every case in which he neglects to obtain an order.[4] So, in a case in California, in which the receiver was authorized to prosecute suits for the recovery of assets of the estate, and having, without an order of court, paid a sum exceeding one thousand dollars, as a reward for the finding of important books of account, which had been lost, it was held that this amount should nevertheless be allowed in his accounts.[5]

When a receiver has been ordered, by mistake, before a final settlement, to pay out more money than is liable to come into his hands as such receiver, such order may be amended or modified, either upon direct and summary proceedings, or by the court upon its own motion.[6] In case a receiver is directed by a final decree to pay out money from the fund, he may lawfully make the payment after an appeal is taken, if it is not perfected by the filing of a bond operating as a *supersedeas;* and although the decree is reversed on the appeal, he can not be required to account for the money so paid out.[7] The general rule that a receiver should not pay out money unless by order of the court, applies to the payment of dividends to creditors.[8]

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[1] Stanton v. Andrews, 18 Bradw. 552, 554 (1886).

[2] Fletcher v. Dodd, 1 Ves. jr. 85; Adams v. Woods, 15 Cal. 206; Hospes v. Almstead, 13 Mo. App. 270, 272.

[3] Smith on Receivers, 44, referring to the MS. case of D'Espard v. Head, 1 Hog. 486

[4] Adams v. Woods, 15 Cal. 206.

[5] Id.

[6] Ryan v. Thomas, 3 N. E. Rep. 653, 655 (Sup. Ct. Ind. 1885).

[7] Hovey v. McDonald, 109 U. S. 150.

[8] As to paying dividends in corporation and partnership cases see *post* under the proper heads.

The supreme court of Indiana recently said: "The office of a receiver is treated as one of confidence and trust. As a rule he can do nothing to impair the funds in his hands without the order of the court and can make no dividend without the special sanction of the court, as the funds in his possession are considered in the custody of the law, for whomsoever may ultimately establish a title thereto. He is the agent of all the parties to the suit in his capacity as an officer of the court. It is well established that courts have power over their own receivers to control them in the settlement of all demands against the property in their hands, and as officers of the court it is their duty to obey the orders of the courts." [1]

The receiver cannot pay out or part with the actual custody of the funds, save at his own risk, without some order, leave or direction authorizing him to do so. "He is for the court that appointed him as much a final custodian as is the Bank of England for the court of chancery." [2]

Even money paid the receiver under a mistake cannot be refunded without an order of court.[3] Money coming into his possession is in the custody of the court, and under no circumstances can he dispose of it without authority from the court.[4] Upon proper application, notice to the parties and proof, the court will award the money held by the receiver to the party entitled to it.[5] That money paid out by the receiver without authority from the court cannot be justified because the receiver acted under the advice of counsel.[6]

But where no answer is filed in the proceeding and the receiver distributes funds according to the facts as alleged in the petition, the plaintiff cannot object.[7] And where a receiver deposited with the receivership fund money belonging to another it was held that the defendant was in no way prejudiced by the receiver giving a check to the person for the amount.[8]

In paying out money under an order of court the receiver is authorized to pay it only to the person named therein or to one having a valid power of attorney from such person. Express authority for payment in any other mode must be shown by the re-

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[1] Herrick v. Miller, 128 Ind. 304.

[2] Ricks v. Broyles, 78 Ga. 610.

[3] Smith v. United States, 135 Ill. 279.

[4] Id.; Duffy v. Casey, 7 Robt. 79.

[5] Duffy v. Casey, 7 Robt. 79.

[6] Id.

[7] Cooper v. Brinkman, 17 Pac. R. 157.

[8] Eccles v. Drovers & Mechanics' National Bank (Md. C. App.), 29 At. R. 968.

ceiver, on peril of being disallowed credit for the amount in his accounting.[1]

Where a receiver proceeded upon conclusions of law stated by the court and paid out certain money, and the final decree of the court inconsistent with such conclusions, it was held that the receiver must be governed by the formal order of the court and not by the conclusions of law.[2]

Strictly speaking a receiver has no right to make any contract binding the property, or to pay out the funds in his hands without first obtaining the authority of the court. When it becomes necessary for the receiver to incur an expense, or make a contract or obligation, or pay out funds, he should apply to the court for an order authorizing him to do so. But courts will adopt the more liberal rule which generally obtains in reference to administrative trusts, that if a receiver, without previous authority, but upon his own responsibility, incurs an expense in the discharge of his duties, which he shows to have been necessary, and such as the court would have authorized if application had been made in advance, to accord him the like indemnity which would have been accorded if the previous authority had been obtained.[3]

A receiver has no right to deliver property in his possession to a claimant without an order of the court.[4]

Section 284. **The Receiver's Rights as to Receiving Money Not Due.**— A receiver appointed to sue for and collect such debts as are or may become due, and pay over to the plaintiff, such sums of money as shall come to his hands, has authority to receive money payable under a contract before it becomes due, and may take notes instead of money, if they be accepted by the plaintiff.[5]

Where a receiver was authorized "to execute and acknowledge for record formal satisfaction and discharge of all real estate mortgages which came to him as receiver, upon payment to, or collection by him thereof, or of debts, the payment of which they were given to secure," it was held that his authority was broad enough to authorize him to receive the money unpaid on mortgages held by him as receiver, whether due or not, at the time of the payment.[6]

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[1] *In re* Brown's Estate, 19 L. R. Ir. 132; S. C. affirmed Id. 188.

[2] Bartlett v. Reicheneker (Wash.), 40 Pac. R. 339.

[3] Henry v. Henry (Ala.), 15 So. R. 916.

[4] Tapscott v. Lyon (Cal.), 37 Pac. R. 225.

[5] Olcott v. Heermans, 3 Hun, 431.

[6] Heermans v. Clarkson, 64 N. Y. 171.

Section 285. **His Authority to Compel Disclosure of the Affairs of a Corporation.**— Receivers have authority to compel a disclosure of any knowledge possessed by any person of the affairs of the corporation, on a proper application for that purpose, by a creditor of the company who cannot maintain a bill of discovery for that purpose, nor a bill to ascertain the priority of incumbrances or claims, or their validity; this is the duty of the receivers, from whose decision an appeal lies.[1]

Section 286. **His Right to Bring Ejectment.**— Although the discussion of a receiver's right to bring an action in ejectment for real property belonging to the estate, comes with greater propriety, under the topic of suits in general, by or against a receiver, it seems proper to state in this place the practice of the English court in this respect. According to the decisions of the court of chancery in England, from which the equity jurisprudence of the courts of America has sprung, a receiver cannot bring ejectment without leave of the court. Indeed, the court has gone so far as to say "he cannot turn out the tenant" without application.[2] The court will direct in whose name the suit shall be brought, and may require the receiver to indemnify the person in whose name the suit is commenced.[3]

As relating also to real property in the hands of a receiver it may here be stated that where timber-trees were blown down on an estate in the possession of a receiver, the court of chancery in Ireland ordered the receiver to sell them to the best advantage, and to keep a separate account of the produce of the sale, with liberty to the parties to apply, at any future time, as they might be advised.[4]

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[1] Smith v. Trenton Delaware Falls Co. 4 N. J. Eq. (3 Green) 505.

[2] Wynne v. Lord Newborough, 1 Ves. Jr. 165; s. c. 3 Bro. C. C. 88.

[3] Green v. Winter, 1 Johns. Ch. 60. In this case Chancellor Kent said that the receiver "will" be required to give security. But no one "would like to take the office of receiver and bring an action of ejectment—and that, too, after getting the authority of the court for it—and still have to give personal indemnity. The receiver would, of course, be liable upon the general security he had given, if he acted wrong in the action, while it would seem that the estate in his hands, belonging to the cause, should solely be amenable. If the chancellor meant that the receiver should give an indemnity as a receiver and not personally, and so that the fund should satisfy any damage, then the difficulty is cleared; and this would be all that should or could be required." Edwards on Receivers, 114. See also Skip v. Harwood, 3 Atk. 564; Wilson v. Greenwood, 1 Swanst. 471; Matter of Merritt, 5 Paige, 125; s. c. on appeal, 16 Wend. 405; Taylor v. Allen, 2 Atk. 213.

[4] Crofts v. Poe, Jones & C. (Ir. Exch.) 193.

Section 287. **The Receiver's Right to Rents.**— The receiver is entitled to all the rents in arrear at the time of his appointment,[1] and to the rents which subsequently accrue during the continuance of the receivership; and an order may be obtained on motion, or summons, with the consent of the tenant, for payment thereof by him to the receiver, notwithstanding he has not attorned.[2]

Where the order appointing a receiver gives him "full power to collect the rents, take care of and preserve the same," he is authorized thereby to collect the rents to become due after the appointment, as well as those due at the date of the appointment, but whatever defenses, counter claims or set-offs the lessee would have had in a suit by the lessors on the lease, are available to the lessee in a suit by the receiver.[3]

Section 288. **The Powers of Receivers in Leasing the Property.**— A receiver cannot, without the special leave of the court, become the tenant of any part of the lands over which he has been appointed.[4] Where a tenant is entitled to a renewal of a lease, the receiver is the proper person to apply to the court for a reference as to the propriety of making the renewal; but such reference will be granted on the application of the tenant, where he offers to make good the terms of the covenant for renewal.[5] A receiver cannot determine a subsisting lease without the leave and under the direction of the court.[6]

A receiver of an infant's estate cannot be authorized to rent the land for the entire period of the infant's minority.[7]

A tenant who has taken from a receiver a lease for a term will not be favored where the rent runs in arrear and he desires to surrender and take a new lease at a reduced rent. He should pay up what is due, before he will be allowed to surrender; and then, might have to run the chance of securing the premises again through a sale of a term of years at auction by the receiver.[8] If a receiver who lets premises gives a notice to quit, the courts of law will respect such a notice;[9] the court will not, at the instance of the receiver, order a remission of arrears or reduction of rents;[10] nor, on the motion of the receiver, order that any of the arrears of rent of the tenants be forgiven.[11]

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[1] Codrington v. Johnstone, 1 Beav. 524.
[2] Hobson v. Sherwood, 19 Beav. 575.
[3] Cox v. Volkert, 86 Mo. 505, 511.
[4] Alven v. Bond, Flan. & K. 196; s. c. 3 Ir. Eq. 224.
[5] Morgell v. Royes, 2 Hog. 235.
[6] Doe v. Read, 12 East, 58.
[7] Ames v. Ames, 148 Ill. 321; 36 N. E. 110.
[8] Lorillard v. Lorillard, 4 Abb. Pr. 210.
[9] Doe v. Read, 12 East, 58.
[10] Robinson v. Shearer, Hayes & J. 799.
[11] Woodward v. Woodward, Hayes & J. 126.

In England it has been said that there is no instance of power being given by the court to a receiver to grant a lease which would bind more than a tenant for life;[1] nor can he grant a lease for a longer time than a year, without the authority of the court.[2] And in Ireland it has been decided that a motion to let lands in the actual occupation of the defendant or respondent in a cause or matter, should be made by the plaintiff or petititioner, and not by the receiver in such cause or matter. If the motion be made by the receiver, and be unopposed, the court will not make any order upon it; and if it be opposed, it will be refused, with costs.[3]

It has been held that a lease for a time beyond the termination of the litigation would be an unjustifiable exercise of judicial discretion, but that it would not be *ipso facto* terminable with the end of the litigation.[4] It was said in the case cited that a lease may be for the customary term, and that when made on motion of the receiver, without notice to the parties, it is not void.

Section 289. **The Rule in New York Concerning Leases by Receivers.**— In a late case in the supreme court of New York, Patterson, J., at chambers, said: "The court had jurisdiction to direct the receiver to make leases of the property, but I do not understand it is the custom in this state, or elsewhere, to authorize long leases of the property to be made by receivers in partition or foreclosure cases. Rentings are generally to be made from year to year, although there may be special reasons, which should induce the court to authorize leases for a longer term. But it does not seem to be proper to authorize leases which shall endure beyond the life of the litigation in which the receiver is appointed, as they act to keep the parties out of possession of the property to which, by the judgment of the court, they are entitled; and if, in an ordinary case, and without any reason appearing, and upon the simple *ex parte* application of the receiver, the court may create a term in property for three years, it may arbitrarily create a term for any indefinite number of years."[5]

Section 290. **The Right to Distrain for Rent — Attornment.**— A brief summary of the law respecting the right of a receiver to distrain for rent may be useful, notwithstanding the fact that this

[1] Gibbons v. Howell, 3 Madd. 479.
[2] Morris v. Elme, 1 Ves. jr. 139. And see Lord Mansfield v. Hamilton, 2 Schoales & Lef. 28.
[3] Wrixon v. Vize, 5 Ire. Eq. 276.
[4] Weeks v. Weeks, 106 N. Y. 626.
[5] Weeks v. Cornwell, N. Y. Daily Reg. Apr. 14, 1887.

remedy is no longer known to the practice of most, if any of the states of the Union.

A receiver cannot distrain for more than a year's rent without an order.[1] It does not clearly appear why the right is restricted as to the time.[2] The duty of a receiver is to collect the rents of the estate, and for this purpose he should, in the first place, call upon the tenants to attorn, by producing a certified copy of the order appointing him and a certificate of the officer of the court that the master's report has become absolute, and by serving copies of them. By the English practice the order of reference and the report itself are produced.[3] The better practice is to serve the order without delay, for, although all the parties in the cause are considered as having notice of the appointment, yet tenants and others who are not parties are only bound from the time the order is served.[4] If the tenants refuse to attorn, the receiver should apply to the court for an order upon them to attorn and to pay the rents to him as receiver in the cause. In support of this application, the order of reference, if there were one, the report of the appointment and an affidavit of the refusal of the tenants must be set out. The court will make the order as of course.[5] If they disobey this order and persist in their refusal, the receiver may, upon affidavit of service of the former order and of their refusal to attorn in obedience thereto, obtain an order that the tenants do attorn within a certain time or that they stand committed.[6] Where the tenant has attorned to the receiver he may distrain without an order,[7] and in his own name.[8]

In New York it was held that, although the doctrine of attornments generally has become obsolete, it should be made use of in the matter of a receivership, as it would bring the receiver within the statutory provision of swearing to the amount due and also save future special applications, and that strangers will not be allowed to disturb the tenants after they have attorned to the receiver.[9] After the tenants of a party have attorned to a receiver, under an order of the court, the court will not allow them, or any

[1] Brandon v. Brandon, 5 Madd. 473. "The registrar states," said the vice-chancellor, "that the practice is for a receiver to distrain upon his own discretion, for rent in arrear within the year, but if in arrear for more than a year, then an order is necessary."

[2] Edwards on Receivers, 126.

[3] 2 Brown's Ch. Prac. 888; 1 Smith's Ch. Pr. 500.

[4] Hemsworth v. Maunsell, 1 Hog. 170.

[5] Edwards on Receivers, 128.

[6] 2 Brown's Ch. Pr. 889.

[7] Kelly v. Belham, Dick. 120.

[8] Davis v. Gray, 16 Wall. 203, 218.

[9] Bronson, J., in Merritt v. Lyon, 16 Wend. 421.

one else, to question the right of the receiver by disturbing his possession.[1] A receiver may distrain for rent without a particular order for the purpose.[2] If the tenant have attorned, the distress can be in the name of the receiver; if otherwise, then it must be in the name of the person having the legal estate.[3] A receiver must not convert his power to let into an instrument of personal favor and private patronage;[4] but he may exercise his discretion as to the time when he will enforce the rent. He is only to take care not to act oppressively.[5] Where a person, not a party to the cause, is in receipt of the rent of a tenant before the receiver is appointed, the tenant will not be attached for continuing to pay to that person instead of the receiver. If the right of such person is questioned, it ought to be ascertained, in a proper proceeding for the purpose; his rights cannot be divested in an *ex parte* proceeding.[6]

It seems that the death of a receiver works no alteration in the order appointing him. In such a case the tenant must retain his rents for a new receiver when appointed.[7]

Section 291. **The Right to Make Repairs on the Property.**— The courts have uniformly required that receivers shall not make repairs upon the property entrusted to them unless permitted to do so by the order appointing them or by leave specially given.[8] If, however, a receiver does make such repairs without express permission, and the sum expended is very small, or if it be shown that he has acted in good faith and for the best interests of the property entrusted to him, or that it was necessary to act immediately, in

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[1] Albany City Bank v. Schermerhorn, 9 Paige, 372.

[2] Pitt v. Snowden, 3 Atk. 750; Bennett v. Robins, 5 Carr. & P. 379.

[3] Hughes v. Hughes, 1 Ves. jr., 161; s. c. 3 Bro. C. C. 87 (n.) (Eden's Ed.)

[4] Blanchard v. Cawthorn, Coop. (*temp.* Brougham), 113.

[5] Lucas v. Mayne, 1 Hog. 394.

[6] Nason v. Blennerhassett, 1 Hog. 402. See also Praed v. Lewis, 2 Moll. 369.

[7] Russell v. Baker, 1 Hog. 180.

[8] Blunt v. Clitherow, 6 Ves. 799; Attorney-General v. Vigor, 11 Ves. 563. In the first-named case it was said: "Receivers must understand that they are not to be permitted to lay out money in repairs at their discretion." *Cf.* Wyckoff v. Schofield, 103 N. Y. 630, 632 (1886), in which Danforth, J., said: "It is plain the receiver had no power to lessen the fund to which the plaintiff had a right to resort. Such directions might have been given by the court if necessary for the preservation of the property. It was not applied to. The expenses were not incurred, nor the repairs made, with its permission, and whether, having been made, the court should allow its receiver to reimburse the contractor, was a matter entirely within its discretion, and from its determination no appeal will lie to this court."

order to prevent damage, his action will be approved by the court.[1] Formerly it was the practice in such cases to refer the matter to a master to inquire concerning the facts and make report as to the necessity for making the repairs and the reasonableness of the expenditure for them.[2]

In England if the order appointing a receiver of a landed estate direct him to manage it, he is thereby authorized to propose to the master to make ordinary repairs without special act of the court.[3] Where a receiver was directed by the order of the court, if necessary, to apply any moneys derived from any of the several pieces of property to the support of the other, it was held that the receiver was warranted in laying out what he thought necessary for repairs, subject to the allowance of such sums as he had spent for that purpose, provided it should appear to the court that they were reasonable and proper.[4] Where repairs to any amount are required, the better practice seems to be for the receiver to present a short petition, showing the state of the premises, and praying for a reference.

Upon the subject of this section the supreme court of Arkansas has said: "Ordinarily a receiver will not be allowed for improvements without previous authority of the court to make them; but where they are made in an emergency or without fault on his part in not procuring previous authority, and are essential to the profitable enjoyment of the estate, and inure to its permanent betterment, the court may allow a reasonable remuneration for them."[5]

The New York court of appeals has declared that expenses incurred by a receiver strictly for the preservation of the property may be charged to the fund in the receiver's possession without previous authority from the court.[6] In Iowa this was said: "What expense a receiver may properly incur becomes a question sometimes of great doubt and difficulty. The fundamental idea is that he must preserve the property and hold the same to be disposed of under the orders of the court."[7]

Where a receiver was ordered to apply money derived from one piece of property to the support of another it was held that he had

[1] Blunt v. Clitherow, *supra;* Waters v. Taylor, 15 Ves. jr. 25; Tempest v. Ord, 2 Meriv. 56; Hynes v. McDermott, 3 N.Y. St. Rep. 582, 585. (N.Y. Common Pleas, Gen. Term, 1886.)

[2] Attorney-General v. Vizor, 11 Ves. 563. See also *In re* Reddington, 1 Moll. 256, and Tempest v. Ord, 2 Meriv. 56.

[3] Thornhill v. Thornhill, 14 Sim. 600.

[4] Hynes v. McDermott, 3 N. Y. St. Rep. 582, 585 (N. Y. Common Pleas, Gen. Term, 1886).

[5] Jefferson v. Edrington, 58 Ark. 545.

[6] Villas v. Page, 106 N. Y. 439.

[7] Snow v. Winslow, 54 Io. 200.

implied power to make repairs without a previous order of the court.[1]

The rule concerning the receiver's powers in making repairs has been correctly asserted thus: "The general rule is well settled that a receiver will not be allowed to incur liabilities for repairs against the estate in his hands, or be credited with any outlays therefor which are not made by leave of court first applied for and obtained. The exception to the rule is that his action may be approved by the court where repairs are made without permission, if the sum expended or incurred is very small, or if it be shown that he acted in good faith and for the best interests of the property intrusted to him, or that it was necessary to act immediately, in order to prevent damage."[2]

Section 292. **Money Deposited by Receiver in Bank—Control of by Bank.**—Where, by the order appointing them, receivers were authorized and directed to carry on and operate railways, and the property thereof, and such carrying on and operating contemplated the transaction of such financial business as required the medium and accomodation of banks, it was held, that in the transaction of this business, moneys deposited in banks were not deposited as special funds, to be drawn out on order of the court, but were deposited generally, to the credit of the receivers, and to be handled and used by the bank as were the deposits of its other patrons, and that the officials of such bank were not guilty of a contempt of court for misconduct in dealing with these funds; but the receivers were ordered to institute the necessary legal proceedings to make such officials individually and collectively liable for all the funds wrongfully obtained and withheld from said receivers.[3]

Section 293. **A Receiver May be Empowered to Conduct a Business When Necessary—His Powers.**—Notwithstanding that it was said by Lord Eldon that "it was not the business of the court to manage or carry on, from time to time, a partnership of any kind; and that it was impracticable for the court to do so,"[4] and while a receiver of the effects of a business should, ordinarily, proceed and sell the establishment without delay, cases sometimes arise in which the business should be carried on by him as usual, so that the good will

[1] Hynes v. McDermott, 14 Daly, 104.

[2] Heffron v. Milligan, 40 Ill. App. 291; approving text of original edition.

[3] Southern Development Co. v. Houston & Texas Central R. R. Co. 27 Fed. Rep. 344, 349. 350 (1886).

[4] Const v. Harris, 1 Turn. & R. 518.

thereof may be secured to the purchaser, and the full value of the establishment realized on such sale.[1]

This principle has been applied in New York in cases in which newspaper property was involved, the receivers being authorized to conduct the publication of the papers until they could be sold.[2] So, also, in England, an order of the vice-chancellor appointing a receiver with power to manage and carry on a newspaper, was affirmed on appeal.[3]

If a receiver carry on a business without authority, he will be held liable for all losses that may be incurred.[4] Where he is directed to sell, and carry on the business until he can sell, he should sell at the earliest practicable moment.[5] The fact that parties were acting as receivers under the appointment of the court of chancery cannot be recognized as a defence to a suit at law for a breach of any obligation or duty which was fairly or voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers.[6] In modern practice receivers are frequently authorized to carry on a business in order to preserve its value.[7]

The business which is continued and carried on by a receiver is that of a corporation or partnership, and the topic of this section will be found discussed at length in the chapters pertaining to those subjects.

It is a matter of judicial discretion as to carrying on the business of the defendant, which will not be disturbed on appeal except "in case of flagrant error and injustice."[8]

Where a receiver was authorized to conduct the business of a partnership and to replenish the stock until it could be sold at a reasonable price, it was held that the order gave authority to the receiver to buy merchandise and pay for it out of the proceeds of

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[1] Chancellor Walworth, in Marten v. Van Schaick, 4 Paige, 480. This suit related to a newspaper, its subscription list and advertising columns, and to a printing establishment. The court said: "But the court will not take upon itself the responsibility of continuing the publication of a political paper, by a receiver, any longer than is absolutely necessary to prevent a sacrifice of the property. Until a sale can be effected, the defendants may continue to superintend the editorial department of the paper, as they have heretofore done; but the paper must be personally responsible for any publication therein which is improper."

[2] Marten v. Van Schaick, *supra;* Dayton v. Wilkes, 17 How. Pr. 510.

[3] Kelly v. Hutton, 17 W. R. 425, 427.

[4] McCay v. Black, 14 Phila. 635.

[5] Hooper v. Winton, 24 Ill. 353.

[6] Blumenthal v. Brainerd, 38 Vt. 402.

[7] Text approved in Blythe v. Gibbons (Ind.), 35 N. E. R. 557.

[8] Wilmington Star Mining Co. v. Allen, 95 Ill. 288.

sales.[1] An order directing a receiver "to conduct and run the hotel, and for that purpose to make such purchases as may be necessary," without any authority to secure money, was held to contain implied powers to purchase necessary supplies to run the business on credit, and that debts incurred by the receiver constituted a charge, first on the income, and, second, on the *corpus* of the property.[2]

Ordinarily the business of the defendant should not be continued.[3] But the power of a court of equity to do so is well established; and such should be done when, to do so, would be business economy.

Section 294. **The Right to Resort to Hypothecated Property for Expenses, etc.**— Where bonds, forming a part of the assets of a life insurance company, which was closing up its business and effecting a reinsurance, were assigned for the protection of sureties upon an indemnifying bond, given by the company reinsuring to the company with which it reinsured, under a contract that after the liability of the sureties was at an end, such bonds should be apportioned among the stockholders of the company reinsuring, it was held that a receiver of the reinsuring company, appointed upon its being declared insolvent, was entitled to resort to the bonds distributed among the stockholders by virtue of the contract, only so far as was necessary to pay the debts and reasonable costs of the receivership.[4]

Section 295. **Right of Receiver to Appeal—Bond.**— Under the old chancery practice and in states where the practice has not been changed by statute, a receiver can appeal from any order which may affect his proper duties. If he had not this power and did not make use of it, injustice might be done to parties in the suit.[5] But whatever right a receiver may have to appeal from an order affecting his duties, he has no right to do so from an order of the court removing or discharging him.[6] In a case in which a receiver appealed from such an order the court decided that chancery will enforce its order of removal of a receiver by attachment, although he has entered an appeal from the order discharging him and filed an appeal bond

[1] Rushworth v. Smith, 84 Pac. R. 482.

[2] Highland Avenue & Belt Railroad Co. v. Thornton (Ala.), 16 So. R. 699.

[3] Vance v. Circuit Judge (Mich.), 60 N. W. R. 761.

[4] Heman v. Britton, 88 Mo. 549; s. c. 5 West. Rep. 330.

[5] Stone v. Byrne, 6 Bro. Parl. Cases, 213; Steele v. White, 2 Paige, 478; Cuyler v. Moreland, 6 Id. 273.

[6] *In re* Colvin, 3 Md. Ch. 278.

which has been approved; and that if any reasonable doubt exist on the question of the right of a party in interest to appeal from an order discharging a receiver, and directing him to account for and pay over the property, it is clear the right of appeal from such an order does not exist in himself.[1] Where parties desire to appeal from an order appointing a receiver, it should be done by the parties affected; as, for instance, by assignees of a debtor, in case he has made an assignment, and not by the debtor.[2]

Under the Alabama code which allows a party or his personal representative to appeal, it was held that a receiver had no right to appeal from an order or decree allowing claims filed by third persons and directing their payment.[3]

A receiver may protect his rights by appealing; as where the order erroneously fixed the amount of money in his possession and ordered him to pay it out.[4] But in Wisconsin it has been adjudged that a receiver is the mere agent or servant of the court and cannot appeal from an order in the suit unless authorized to do so by the court.[5]

What has been stated in this section as to the right of a receiver to appeal has been said in reference to an appeal from an order or decree rendered in the receivership proceeding. Where a receiver is a party to a suit he has, of course, the same right to appeal as any litigant.[6] The right of a receiver to appeal in an intervening proceeding has also been declared; it being said that he represents all parties in interest.[7]

Where a federal receiver was sued in a state court, and was ordered to give an appeal bond, the federal court sustained the objection to the order, declaring that the receiver should not be required to bond.[8]

Section 296. **Statute of Limitations — Of the Effect of the Receiver's Acts upon the Statute.**—The operation of the statute of limitations upon the rights of parties is not affected by the appointment of a receiver over property in which they are inte-

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[1] *In re.* Colvin, 3 Md. Ch. 278.

[2] Edwards on Receivers, 156, quoting Chancellor Walworth in Scholefield v. Hull (MS. 1839), in which the debtors took the appeal and not their assignees.

[3] Dorsey v. Sibert, 93 Ala. 312.

[4] How v. Jones, 60 Io. 70.

[5] McKinnon v. Wolfenden, 78 Wis. 237.

[6] People of State of New York v. Troy Steel & Iron Co. 82 Hun, 303.

[7] Thon v. Pittard, 10 U. S. C. C. App. 352; s. c. 62 Fed. R. 232; Felton v. Ackerman, 9 U. S. C. C. App. 457; s. c. 61 Fed. R. 225.

[8] Caldwell, C. J., in Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R. 551.

rested.[1] It has also been decided that the payment by a receiver to one of the parties in the cause, of a part of a debt due from him whose property he has in his possession and made out of the funds in his hands as receiver, does not take the matter out of the statute of limitations, since it is not to be looked upon as an acknowledgment of the indebtedness by the debtor and is not a payment made by him. Such a payment is made by the receiver, as such, and by virtue of his being an officer of the court.[2] On the other hand the ruling is that, as in favor of a stranger to the suit, the appointment of a receiver will prevent the running of the statute.[3]

The statute of limitations runs against a receiver.[4]

Section 297. **Rights of a Receiver in Place of an Assignee — Fraudulent Conveyances.**—If a receiver be appointed to take the place of an assignee, under an assignment for the benefit of creditors, he will have all the rights, privileges and powers of the assignee, but none others, and is, to all legal intents and purposes, *quoad* the assignment and its execution, the original assignee.[5]

A receiver so appointed and acting, is the only one who can attack conveyances made by the assignor to third parties, and creditors must move through him when conveyances by the assignor in fraud of their rights are to be set aside.[6] The statute of Michigan,[7] which declares that an assignee of an insolvent may recover any property or equity which could be reached by creditors, has been construed to confer the same power upon a receiver appointed and acting in the place of such an assignee.[8]

Section 298. **Right of Receivers to Attack Judgments Confessed and Conveyances Fraudulently Made by the Debtor.**—Upon the subject of this section the New York court of appeals has said: "The receiver unites in himself the right of the trust combination and also the right of creditors, and * * * he may assert a claim as the representative of creditors, which he might be unable to assert as the representative of the combination merely. The general rule is well established that a receiver takes the title of the corpora-

[1] Kyme v. Dignan, 4 Ir. Eq. 562; Harrison v. Dignan, 1 Con. & Law (Ir. Chan.), 376.

[2] Whitely v. Lowe, 2 DeG. & J. 704, affirming S. C. 25 Beav. 421.

[3] Wrixon v. Vize, 3 Dru. & War. 104.

[4] Wardle v. Hudson, 96 Mich. 432.

[5] Fouche v. Brown, 74 Ga. 251, 264.

[6] Angell v. Packard, 28 North West. Rep. 680 (Mich. 1886).

[7] How. Stat. § 8741.

[8] Heineman v. Hart, 55 Mich. 64, 66. In this case the court upheld the receiver's right to attack for fraud a chattel mortgage executed by the insolvent assignor.

tion or individual whose receiver he is, and that any defence which would have been made against the former, may be asserted against the latter. But there is a recognized exception, which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights."[1]

"The receiver is clothed with such rights of action as might have been maintained by the person for whose estate he has been appointed, and to whose rights, for purposes of litigation he has succeeded." Upon this principle it was held that the right of a receiver to vacate a judgment confessed by an insolvent corporation before his appointment was no greater than that of the corporation itself.[2]

The supreme court of Illinois has also declared that a receiver has no greater rights than the party whose receiver he is, and that as such party would be estopped from setting up his own fraud and profiting thereby, the receiver could not assail a prior conveyance on the charge of fraud.[3]

But this announcement is not in accord with the decisions of the New York courts, including the case of Pittsburg Carbon Co. v. McMillan already cited. The common pleas court of New York city, general term, has recently considered the subject at length,[4] declaring that a receiver of an insolvent corporation represents, for different purposes, three distinct interests: one as trustee of the corporation; another for the benefit of stockholders; a third for the benefit of creditors; that "for certain purposes he may and can represent one only. * * * In general he can bring no action which the parties or estate which he represents could not maintain. But in seeking to set aside a transfer made by a corporation he acts, not for the corporation, but adversely to its interest, and consequently not for the stockholders." But it was said to be "fundamental that a creditor cannot attack a transfer of property as fraudulent until he has recovered judgment and issued execution; and if the creditors could not, without a judgment and execution returned unsatisfied, this receiver, who stands in their shoes, can not, unless some statute dispenses with the necessity of judgment and execution."

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[1] Pittsburg Carbon Co. v. McMillan, 119 N. Y. 46.

[2] Burch v. West, 134 Ill. 258; affirming s. c. 33 Ill. App. 359; or of a fraudulent conveyance, Walsh v. St. Paul School Furniture Co. (Minn.) 62 N. W. R. 383.

[3] Gottlieb v. Miller, 154 Ill. 44; s. c. 39 N. E. R. 992.

[4] Buckley v. Harrison, 31 N. Y. S. 999.

The condition imposed as precedent to the right of the receiver to assail the conveyance is destructive of the right; for it cannot be perceived under what circumstances a receiver would have cause or right to sue and recover judgment against the party whose trustee he is. All the property and assets of the party are, or are supposed to be, in the receiver's possession; and to require the futile and empty ceremony of recovering judgment and having execution issued and returned, is violative of the maxim, that the law does not require the doing of that which would be useless, and unavailing.

If the receiver has a distinct character as the representative of creditors, and may under any conditions assail a conveyance made by the defendant in the receivership proceedings, the right to do so is certainly complete after final decree and the allowance of claims against the defendant.

The same question has been considered and determined by the supreme court of Minnesota.[1] The right of a receiver to maintain an action to reach assets of the insolvent fraudulently concealed or disposed of by him, whether such action be to set aside fraudulent conveyances, or to enforce a trust in favor of creditors, was declared. And it was expressly held that it was not necessary that the claims of the creditors be first reduced to judgment. The supreme court of Indiana has declared that after the appointment of a receiver he alone has the right to sue to set aside a fraudulent conveyance made by the debtor.[2]

The current of authority favors the proposition that a receiver succeeds only to the rights of the defendant in the receivership suit, and is subject to all the equities that could have been successfully invoked against the latter.[3] This doctrine denies the right of a receiver to maintain an action in which it is sought to assail a conveyance of the defendant's property on the charge of fraud.

But the decisions of the courts of New York, Indiana and Minnesota upon the question are well founded in justice and reason. The receiver of a corporation and partnership is peculiarly and specially the representative of the creditors, and his appointment is primarily to secure the satisfaction of their claims. That he should have the right to follow the property of the debtor and recover it or its value when fraudulently concealed or conveyed should not be questioned, and ought to be conceded.

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[1] Chamberlain v. O'Brien, 46 Minn. 80.

[2] National State Bank v. Vigo National Bank, 40 N. E. R. 799.

[3] Lincoln v. Fitch, 42 Me. 456.

Although a receiver appointed in supplementary proceedings succeeds only to the rights and stands in the place of the judgment debtor, yet the authorities agree that he has the right to assail conveyances made by the latter in fraud of his creditors.[1] So of a receiver in a judgment creditor's action.[2]

Section 299. **Of Officers Having the Powers of Receivers Although Not Appointed as Such.**—It sometimes happens that courts appoint custodians for specific funds or property, or other curators for special purposes, whose duties and rights, as to the property placed in their keeping, are in most respects similar to those of a receiver. In these cases the courts apply to them, in determining questions involving their powers and rights, the same rules which are applicable to receivers. Being subject to the orders of court in all matters affecting the fund or other property confided them, they have the reciprocal right of being protected by the court against personal loss for necessary and proper disbursements.[3]

On the same principle, in a case in which the court, instead of appointing a receiver, allowed the defendant to retain the property in controversy upon his executing a bond to account for it and to pay it over as might be decreed by the court, it was held that the bond was good and effective as an obligation at common law, and that the defendant, although not a receiver or an officer of court, occupied the position of one who had assumed a legal responsibility for a personal accommodation and that he was estopped from denying the legality of the obligation, especially after he had derived benefit from it.[4]

Section 300. **Of the Termination of a Receiver's Functions by Abatement or Supersedeas.**—The functions of a receiver will not of necessity terminate because of the abatement of the suit wherein he was appointed; in such case his authority continues until he is formally removed by an order of the court, and in the interval he may proceed as before the abatement, to perform his duties under the order of his appointment. Such, at least, is the rule to be deduced from an Irish case in which the receiver was directed, after suit abated, to take every step to enforce the collection of rents, which it was his duty to receive and account for.[5]

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[1] Section 689.

[2] Weber v. Weber (Wis.), 63 N. W R. 757.

[3] Adams v. Haskell, 6 Cal. 475.

[4] Baker v. Bartol, 7 Cal. 551.

[5] Newman v. Mills, 1 Hog. 291.

But where an appellate court grants a *supersedeas*, upon an appeal, directing a receiver to restore the property in his care to those from whom it was taken, the effect is to suspend the power of the court below and necessarily to render the authority and functions of the receiver inoperative by operation of law. It does not pronounce unlawful what has already been done by him under the order of the court below, but it suspends his powers and prevents him from acting further under such order. A refusal to obey the mandate of the appellate court in such a case has been adjudged a contempt of court and punished accordingly.[1]

[1] State v. Johnson, 18 Fla. 88. See sections 116, 117.

CHAPTER XI.

OF THE RECEIVER'S DUTIES AND LIABILITIES.

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303. His Duty in the Absence of a Specific Order—Irregular or Insufficient Orders.
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332. Of the Liability for Endangered Wall Under the New York Statute.
333. Of the Disposition of Assets Under the New York Statute.
334. Of the Duties of Receivers Appointed by the Courts of the United States Under the Statute of March 8, 1887.
335. Of the Liability of Persons Improperly Acting as Receivers.

Section 301. **Generally of the Duties and Liability of Receivers—Good Faith.**—"A receiver is a trustee, bound as such to the exercise of prudence and good faith in all his dealings with the estate, and to bring to the discharge of his official duties the same measure of skill and the same measure of personal supervision that he would give if the estate were his own."[1]

The law requires that a receiver exercise ordinary and reasonable care and diligence in the execution of his trust.[2] It has been asserted that the courts will not sanction receivers "being let loose upon the general public free from all restraint or responsibility."[3]

"A receiver is but the steward of the court, and should give to the court all the information necessary to enable it to judge intelligently as to the manner in which it is being served by its agent."[4]

"It may be said to be one of the first duties, if not the first duty of a receiver, after taking possession, to make a complete inventory of the property."[5] Failure to make and file an inventory, will, when resulting in loss to the parties, be good reason for refusing to allow the receiver's accounts.[6]

Where a receiver failed to sell the good will of a partnership it was adjudged that he must account for its value.[7] He is liable for loss resulting from his fraud. Thus where the receiver conspired with the defendant to sell the property to a third party and then have it conveyed to the defendant's wife for his benefit, such sale was held to be void and the receiver chargeable with the full value of the property.[8]

A receiver cannot be adjudged guilty of contempt for disobeying an order made by the same court which appointed him, but in another proceeding.[9] He is responsible and must answer only to the appointing court.[10]

Good faith on the part of the receiver will often exempt him from liability. As when he acted under the advice of counsel.[11] When one of two receivers was interested in a partnership to which prop-

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[1] Schwartz v. Keystone Oil Co. 153 Pa. St. 288.

[2] Johnston v. Keener, 23 Ill. App. 220. See section 309.

[3] Hale-Berry Co. v. Diamond State Iron Co. (Ga.) 22 S. E. R. 217.

[4] Heffron v. Rice, 40 Ill. App. 244; s. c. (Sup. Ct.) 36 N. E. R. 562.

[5] Heffron v. Rice, 40 Ill. App. 244.

[6] Heffron v. Rice (Ill. Sup. Ct.), 36 N. E. R. 562.

[7] Mechanics' National Bank v. Landauer, 68 Wis. 44.

[8] Moon v. Wineman, 59 N. W. R. 494.

[9] Morritt v. Sparling, 34 N. Y. S. 882.

[10] Alabama & Chattanooga Railroad Co. v. Jones, 7 Nat. Bankr. R. 145, 170.

[11] United States v. Church of Jesus Christ of Latter Day Saints, 21 Pac. R. 506.

erty of the estate was sold, the sale was affirmed in the absence of a showing of bad faith.[1] But good faith will not avail a receiver who disregards a plain direction of the court.[2]

Where an appeal was taken from an order appointing receivers and bond given, the property being returned to the defendant under order of the court, it was held that, on affirmance of the judgment, it was the duty of the receiver to sue on the appeal bond without an order of court directing him to do so.[3]

Receivers are subject in all things to the direction and control of the court whose officers they are, and when in doubt as to performance of their duties should apply to the court for specific instructions.[4]

Receivers are subject to the doctrine of estoppel.[5] They are liable for the torts of their predecessor in office.[6] They are not liable for services voluntarily rendered in assisting litigation, in the absence of contract to pay therefor.[7]

Section 302. **A Receiver's First Duty is to Obey the Orders of the Court Appointing Him.**—The obligation upon a receiver to obey and follow the orders of the court whose executive officer he is, so far as the property in his care is concerned, and at whose determination he may be deprived of his office or punished by the *quasi* criminal proceeding of contempt for disobedience, is so obvious that the statement of it seems almost unnecessary.[8] The power of the court to punish the disobedience of its order by a receiver has been most frequently exercised in cases where he neglected or refused to pay over money as directed. In such cases it has been held that, instead of granting an order in the first instance to commit him, it is the better practice to issue an alternative order directing him to pay the money within a certain time designated in the order or stand committed;[9] that it is not necessary to serve a writ of execution of a decretal order, but only a copy of the order, for disobeying which he may be committed;[10] that, upon an appeal

[1] Wagner v. Swift's Iron & Steel Works (Ky.), 26 S. W. R. 720.

[2] Carr's Administrator v. Morris, 6 S. E. R. 613.

[3] Everett v. State of Maryland, 28 Md. 190.

[4] Schwartz v. Keystone Oil Co. 153 Pa. St. 283; Sullivan v. Miller, 106 N. Y. 685.

[5] Wilmington Star Mining Co. v. Allen, 95 Ill. 288.

[6] McNulta v. Lockridge, 137 Ill. 270.

[7] Daniell v. East Boston Ferry Co. 31 N. E. R. 711.

[8] See *passim*. Adams v. Haskill, 6 Cal. 475; Davies v. Cracraft, 14 Ves. 143; *In re* Bell's Estate, L. R. 9 Eq. 172; Anon. Mos. 40; People v. Brooks, 40 Mich. 333; Clark v. Binninger, 75 N. Y. 344; People v. Jones, 33 Mich. 303.

[9] Davies v. Cracraft, 14 Ves. 143.

[10] Anon. Mos. 40.

from an order adjudging contempt, the propriety of the order which was disobeyed will not be reviewed,[1] and that, in proceedings for contempt for not paying money as ordered, the receiver cannot justify his refusal by pleading that the money so ordered to be paid has been garnished.[2]

Even if the appointment has been vacated he is bound to obey an order to restore the property and money in his hands to the parties named in the order under penalty of being committed for contempt of court.[3] A receiver should follow the line of duty marked out by the decree, and if loss result from a departure therefrom he will be required to bear it; the fact that the departure is made under the advice of counsel will relieve him from the imputation of *mala fides*, but not from liability.[4]

A receiver may be summarily dealt with for disobedience to or neglect of any orders given him by the court touching the custody, management or control of the estate.[5]

When the receiver follows the order of the court his duty is discharged and all personal liability avoided.[6] He cannot be adjudged guilty of contempt for disobeying an order of the court made in another proceeding.[7]

Section 303. **His Duty in the Absence of a Specific Order—Irregular or Insufficient Orders.**— In the absence of specific, detailed authority over the property, the duties of the receiver are such as are imposed by law, namely, to take charge of the property and safely keep it, subject to the further order of the court.[8] If, in a partnership case, a receiver has been irregularly appointed, as for instance, without notice, or by a judge out of court, the order will be sufficient to protect the receiver if he has acted under it in good faith, and no steps have been taken to set it aside by a motion or appeal; but in such case his accounts will be examined with great strictness.[9] Where an order requiring the receiver to pay the fees of a referee who had passed upon his accounts, by its terms appeared to have been made without notice to the receiver, and by a different justice from the one before whom the motion was first heard, and

[1] Clark v. Binninger, 75 N. Y. 344.
[2] People v. Brooks, 40 Mich. 333.
[3] People v. Jones, 33 Mich. 303.
[4] McCay v. Black, 14 Phila. 635, 637. In this case the receiver carried on a business for a time instead of winding it up immediately, as was contemplated.
[5] Lichtenstein v. Dial, 68 Miss. 54.
[6] Schmidt v. Gaynor (Mich.) 62 N. W. R. 265; Sullivan v. Miller, 106 N. Y. 635. See section 305.
[7] Merritt v. Sparling, 34 N. Y. S. 882.
[8] Demain v. Cassidy, 55 Miss. 320, 322.
[9] Corey v. Long, 12 Abb. Pr. (N. S.) 427, 438.

did not recite regular adjournments, the court refused to enforce compliance with it by process for contempt.[1]

Section 304. **A Receiver is Strictly Amenable to the Court which Appoints Him.**—A receiver, duly appointed, is amenable to the court which appointed him for a proper discharge of the trust confided to him,[2] and under ordinary circumstances to that court only.[3] He is not to be adjudged guilty of contempt in disobeying an order made by the court which appointed him, but in another proceeding.[4]

An apparent exception to this rule was made in Massachusetts, where it was held, in a case where receivers appointed by a court in Vermont were acting as common carriers and, by the laws of Vermont, were liable as such receivers to actions at law, that they could be sued for a breach of their duty as common carriers in the courts of Massachusetts.[5]

His amenability to the court appointing him arises from his being its officer, and consequently continues until he is finally discharged by the act of the court.[6] So it has been held that a compromise and dismissal of the suit does not discharge his accountability to the court, although he can not be sued upon his bond until he has failed to obey an order relating to the effects in his hands.[7] And where a bill was dismissed on demurrer for want of equity, it was held that, although the functions of the receiver ceased *inter partes*, he was still amenable to the court, as its officer.[8] Only the court which appointed him can divest him of the trust which it

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[1] Perkins v. Taylor, 19. Abb. Pr. 146.

[2] Walker v. Morris, 14 Ga. 323; Henry v. Kaufman, 24 Md. 1.

[3] Conkling v. Butler, 4 Biss. 22, where the court refused to entertain a bill to compel a receiver to account for the performance of his trust, because he was not the officer of that court and could not be required to answer to it. Young v. Montgomery & Eufaula R. R Co. 2 Woods, 606, 619, where application for the removal of the receiver was made to, and refused by, a court other than the one which appointed him.

[4] Merritt v. Sparling, 34 N. Y. S. 882.

[5] Page v. Smith, 99 Mass 395. The court, Foster, J., said: "It is impossible for the courts of this commonwealth to accord to these defendants an exemption from the ordinary common law liabilities of common carriers more extensive than they are allowed in the state in which they were appointed receivers and in which the accident occurred. Under these circumstances, the ordinary rule for which the defendants contend—that receivers are amenable solely to the court by which they were appointed— is inapplicable." The report does not show that leave to sue the receivers was first obtained, and in this respect is contrary to the well established rule, as will appear *infra*.

[6] Henry v. Kaufman, 24 Md. 1; Field v. Jones, 11 Ga. 413; State v. Gilson, 21 Ark. 140.

[7] State v. Gibson, *supra*.

[8] Field v. Jones, *supra*.

imposed upon him.[1] Out of this rule as to the receiver's amenability to the court which appointed him, has grown the well-established practice of requiring all persons desiring to enforce claims against the receiver by proceedings in that court, or any other, first to obtain its leave, as we shall see when discussing suits against receivers.

Section 305. **Particularly of the Receiver's Personal Liability.**—The liability of a receiver is either personal, when he must answer out of his own funds; or, official, when the judgment is to be satisfied out of the trust estate. In speaking of the liability of receivers in this chapter the careful reader will readily discern from the context whether the liability asserted is personal or official; but in this section we wish to consider the personal liability of receivers only.

"The receiver is the mere officer or instrument of the court in the preservation and operation of the property, and any acts of his not within the scope of the authority conferred by the order appointing him, and not otherwise authorized by the court, do not bind the court."[2] The corollary of this proposition is, that if a receiver, in making a contract, acts without authority, or exceeds his authority, he becomes and is personally obliged by the agreement, and must answer individually for its performance. This is the application of the principle which declares and fixes the personal liability of an agent who enters into a contract with a third person without the authority of the principal.[3] This doctrine has been extended to public officers,[4] and must and does include receivers. It produces the correlative, that when a receiver acts within the scope of his authority as given by the court, he incurs no personal liability.

If the circumstances of any particular case show that the third person did not propose or intend to bind the receiver personally under any contingency, this fact would avoid individual liability.

A receiver may frequently, under color of office, obtain possession of property to which he is not entitled; and it has been said that "his official character ought not to be a defense to his tortious action, or deprive parties of their rights. * * * As a wrongdoer he is liable personally, whether liable officially or not;" and

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[1] Galster v. Syracuse Savings Bank, 29 Hun, 594.

[2] Farmers' Loan & Trust Co. v. Chicago & Alton Railway Co., 42 Fed. R. 6.

[3] Story on Agency, 9th ed. sec. 264.

[4] Throop on Public Officers, sec. 773.

in an action of replevin or for conversion.[1] But when a receiver is lawfully in possession of property he is not liable personally to the claimant thereof.[2] There is lawful possession when the property is voluntarily delivered to the receiver.[3] And where a receiver in a foreclosure proceeding seized and sold property not included in the mortgage, he was adjudged personally liable, and that neither good faith nor his official character would avail him as a defense. In such a case leave of court to sue is not necessary.[4] When a receiver takes possession of property not included in the mortgage he is liable as a trespasser; and this though the court ordered him to do so.[5] In the case cited it was said that to the extent of taking the property not included in the mortgage the court exceeded its jurisdiction and its decree was void.

In the employment of counsel and assistants a receiver will be personally liable for their compensation when the engagement is made without authority.[6] They may look primarily to the receiver for their compensation, which he will be required to pay; but he may afterward present the accounts to the court for allowance.[7]

If a receiver appoints an agent without authority he is personally liable for the latter's acts.[8] It has been held, that where a receiver, without authority, conducted a boarding house in property of the estate which brought no income; and this was done to assist the estate, and the receiver received no profits from the business, that he did not incur any personal liability.[9] This is clearly an erroneous decision, and is not supported by either reason or authority.

A receiver of a hotel, the business being continued, cashed a check for a guest. As this was not unusual among hotel managers, it was held that the receiver was not personally liable for loss resulting from a return of the check.[10]

Under no circumstances does a receiver incur any personal liability when he acts in strict conformity with the directions of the court,[11] where it has jurisdiction to make the order. He is not per-

[1] Gutsch v. McIlhargey, 69 Mich. 377; Kenney v. Ranney, 96 Mich. 617; approving Gutsch v. McIlhargey, 69 Mich. 377.

[2] Tapscott v. Lynn (Cal.) 87 Pac. R. 617.

[3] Id.

[4] Gutsch v. McIlhargey, 69 Mich. 377; Kenny v. Ranney, 96 Mich. 617.

[5] Staples v. May, 87 Cal. 178.

[6] Davis v. Stover, 16 Abb. Pr. (N. S.) 225; Rogers v. Wendell, 56 Hun, 540; Ryan v. Rand, 20 Abb. N. C. 313; Meyer v. Lexow, 37 N. Y. S. 67.

[7] Sayles v. Jordan, 2 N. Y Supp. 827; Ryan v. Rand, 20 Abb. N. C. 313.

[8] Union Trust Co. v. Chicago & Lake Huron Railroad Co. 7 Fed. R. 513.

[9] Hynes v. McDermott, 14 Daly, 104.

[10] Hefron v. Rice (Ill.), 36 N. E. R. 562.

[11] Schmidt v. Gaynor (Mich.), 62 N. W. R. 265; Walsh v. Raymond, 58 Conn. 251.

sonally liable for loss to the trust estate, unless it were occasioned by some act which he was not authorized to perform.[1]

Section 306. **Of the Receiver's Duty in Taking Possession of Property.**— In New York, Sandford, J., stated the long established practice in the court of chancery, in respect of the duty of a receiver as to taking possession of property, viz.: "It never was the design to permit the receiver, under a general direction to take possession of the debtor's property and effects, to go and seize such as he, acting on his own judgment, should deem to fall within the scope of the order. Such a practice would inevitably lead to collisions of a violent character, between the receiver and persons possessing, or claiming to possess, the property alleged to belong to the debtor. There is no necessity for such collisions, and the practice of our courts of equity was so adjusted as to protect the receiver from their recurrence. The master, from time to time, on taking the examinations and proofs, made orders designating, specifically, the effects, which in his judgment, were shown to be in the possession or under the control of the judgment debtor, and directing him to deliver the same to the receiver. If the effects were in his immediate possession, in the presence of the master, the direction was to deliver them forthwith. If they were not present, but consisted of evidences of debt, personal ornaments, or like portable articles, the master directed them to be brought and delivered to the receiver, at a time and place designated, either in the master's presence or elsewhere in his discretion. If the effects were ponderous articles, such as household furniture, the master appointed a day and hour, at the place where they were situated, for the debtor to attend and deliver the same to the receiver. Thus the receiver's duty was simply to attend at the time and place appointed, and receive and take into his keeping certain specified property and effects. In the case of household furniture, or other ponderous goods, he would, of course, provide himself with the requisite assistance to remove them to a suitable depository. If, under such an order, the debtor refused to deliver the articles, the plaintiff in the suit, as the actor in the litigation, applied to the court for an attachment. On that motion the debtor, by way of appeal from the master's order, was at liberty to show that his direction for the delivery of all or any of the chattels was erroneous. Unless he could satisfy the court of such error process of attachment ensued, and the debtor was compelled, by its constant penalties, to comply with the order made by the master. In

[1] Chandler v. Cushing-Young Shingle Co. (Wash.) 42 Pac. R. 548.

the whole course of the proceeding there was no occasion for the receiver to act, except under the specific order of the court; nor then, in any mode which would involve him in personal collisions or in any disorder or violence. He acted as an officer of the court protected by its strong arm, in the peaceable yet efficient exercise of his duties."[1]

In England it was held that it was the duty of the parties in interest to apply for an order upon the person in possession to deliver the property to the receiver, and if any loss occurred by reason of the owner's remaining in possession, the fault was not the receiver's, but theirs.[2]

It is the duty of the receiver to take possession of all the debtor's property, and, if necessary, to invoke the aid of the court in compelling its surrender.[3] He must not assume a position of indifference and permit the defendant to deliver up the property at his pleasure. He is required to exercise reasonable diligence in this regard.[4] Where land was in litigation it was held the receiver properly refrained from taking possession of it.[5]

Section 307. **Of the Duties and Liabilities Arising from Taking Possession.**—A receiver who takes possession of goods upon which the sheriff had levied an execution prior to the receiver's appointment, is bound to account to the sheriff therefor; and the motion of the execution creditor and sheriff for an order requiring him to pay to the sheriff the proceeds, so far as necessary to satisfy the execution, should be granted.[6] Moneys coming into the hands of a receiver at any time before, as well as after, his security is perfected, must be accounted for by him, and must also be accounted for by a surety who has undertaken to account for what the receiver "should receive and become liable to pay as such receiver."[7] The rule that a receiver's appointment is conditional until the perfecting of his security applies only to cases where the question relates to his title as against third parties, and not to cases where his own ability or that of his surety, with regard to moneys received by him as receiver, is in question.[8] If a receiver forcibly take possession of property mortgaged by the defendant before his

[1] Dickerson v. Van Tine, 1 Sandf. Super. Ct. 724, 727.

[2] Griffith v. Griffith, 2 Ves. 400.

[3] Brandt v. Allen, 76 Io. 50; Clapp v. Clapp, 49 Hun, 195.

[4] Clapp v. Clapp, 49 Hun, 195.

[5] United States v. Church of Jesus Christ of Latter Day Saints, 21 Pac. R. 506.

[6] Rich v. Loutrel, 9 Abb. Pr. 356; s. c. 18 How. Pr. 121.

[7] Smart v. Flood, 49 L. T. 467.

[8] Ibid.

appointment, in violation of an injunction restraining him from so doing, and without leave of court, and sells it, he is a trespasser and incurs the same liability as the mortgagor himself would have incurred in the same circumstances.[1]

Where a receiver obtained judgment and sued out execution against a debtor, and proved the debt in the bankrupt court, the receiver was not guilty of *laches* and ought not to be held liable for the loss of the debt, but he should be held to account for a sum collected by him from the debtor and applied to an individual debt owed to himself by the debtor.[2]

If a receiver forcibly takes possession of property in the possession of one party not a party to the suit, he does so at his own personal risk. He is not acting for the court, and will not ordinarily be protected by it. He should demand the goods, and, if refused, begin proceedings to recover them.[3]

Where a receiver takes possession of property, under an order appointing him, not especially mentioned in the order, he does so at the risk of it being the property of the defendant. He would be protected in taking possession of any particular property when expressly authorized and directed to do so; but under an order directing him generally to take charge of property of the defendant, without any particular description, he must be careful to seize only what actually belongs to the insolvent; and if he seizes what belongs to others it will be at his own risk.[4]

Section 308. **The Receiver Should be Entirely Impartial.**[5]— Since, as we have seen, a receiver is not appointed for the benefit merely of the party on whose application the appointment is made, but equally for the benefit of all persons who may establish rights in the case, it follows that he is not the complainant's agent, but equally the representative of all the parties, in his capacity as an officer of the court. The position is one often requiring the exercise of the soundest judgment and always the strictest impartiality among creditors.[6] A receiver of an estate assigned for the benefit of creditors is subject to the general duties requiring impartiality; he cannot collude with any one, or prefer one set of interests to

[1] Manning v. Monaghan, 1 Bosw. (N. Y.) 459. This case was reversed on another point; s. c. 23 N. Y. 539, and retried, s. c. 10 Bosw. (N. Y.) 231.

[2] Reynolds v. Pettyjohn, 79 Va. 327.

[3] Tapscott v. Lyon (Cal.), 37 Pac. R. 225.

[4] Hale-Berry Co. v. Diamond State Iron Co. (Ga.), 22 S. E. R. 217.

[5] See chapter 4.

[6] First National Bank v. Barnum Wire & Iron Works, 27 N. W. Rep. 657, 661 (Mich. 1886).

another; the power to appoint him is subject not only to all rights paramount to the assignment, but to legal conditions.[1]

Section 309. **Keeping and Paying Out the Funds — Depositing — Loaning and Investing—Interest—Rights and Liability—Generally of the Degree of Care Required of Receivers.**— A receiver should keep the exclusive control of his funds; if he does not, and loss ensues, he will be liable. In the leading case on this point Lord Chancellor Brougham said: "It is admitted on all hands that, if a receiver puts a fund out of his control, so that other persons shall be able to deal with it, he guarantees the solvency of those persons and becomes answerable for any loss that may ensue. However good his intention, the departing with the control to the extent of giving that control to another, would be enough to make him a guarantee of the fund. The principle is so obvious that I say nothing of the authorities."[2]

Concerning the duty of a receiver in keeping the funds in his possession and his liability for their loss, the supreme court of Georgia has said: "When money waiting the result of litigation is in the possession of a receiver at the place of permanent custody and he has no further duty in respect to it but that of preservation, it is already in court, the receiver being the end of the court to hold it, and he cannot pay it out or part with his actual custody of it by depositing it in bank, or otherwise, save at his own risk, without some order, leave or direction authorizing him so to dispose of it. He is for the court that appointed him as much a final custodian as is the Bank of England for the court of chancery. His poundage or commission or compensation for his risk, is that of an official bailee for reward; and while he may not be bound for more than ordinary diligence, this diligence is to be exercised in keeping the money, not in putting it out on deposit, either general or special."[3]

Recently the supreme court of Pennsylvania considered the subject of this section, and, as to the receiver depositing the funds in bank said: "It was the duty of the receiver to keep the trust fund separate from his own; he had no right to mingle them. In depositing them in bank he should have made sure that they were

[1] First National Bank v. Barnum Wire & Iron Works, 58 Mich. 315 (1885); Iddings v. Bruen, 4 Sandf. Ch. 417.

[2] Salway v. Salway, 2 Russ. & M. 215, affirmed by the House of Lords; s. c., *sub nom.*, White v. Baugh, 9 Bligh (N. S.) 181; s. c., 3 Clark & F. 44. In this case to obtain bondsmen the receiver agreed that the fund should be deposited in bank in the joint names of the sureties, to be drawn out only by the draft of a partner of one surety endorsed by the receiver. The bank failed, and the receiver and his sureties were held for the loss.

[3] Ricks v. Broyles, 78 Ga. 610.

placed to his credit as receiver; for it was in that capacity alone that he was entitled to their custody, and they were at all times subject to the order of the court, in whose hands, in contemplation of law, the fund actually was."[1]

In a case decided by the supreme court of Virginia a receiver appointed before the civil war was ordered to collect certain money and pay it at the next term of court. Because of the war there was never a "next term of the court." The money was deposited in bank, and lost, the bank being wrecked by the war. The doctrine was announced that when a receiver deposits funds in bank, and exercises the same care a prudent man would be expected to exercise with his own money, the receiver is not personally responsible for any loss resulting from the act.[2]

Where, in South Carolina, a receiver deposited funds on interest in a bank in another state, and failed to report the fact to the court, and the bank failed and the money was lost, the receiver was held personally responsible therefor.[3]

Undoubtedly a receiver should not mingle the trust funds with his own account; they should be deposited in his name as receiver.

The foregoing cases are confusing and do not clearly announce the rules concerning the liability of receivers in the case of the funds in their possession.

To consider the question intelligently and logically the degree of care which a receiver is required to exercise in performing his duties must be ascertained. The principles of the law of bailments are applicable to trustees in general, and consequently to receivers. A receivership is within the third subdivision of the fifth class of bailments as given by Lord Holt: *locatio custodiæ;* which is the third classification of Judge Story: "Those for the benefit of both parties;" which Mr. Schouler calls "ordinary bailments for mutual benefit."

This class of bailments is for recompense, and requires the exercise of ordinary, as distinguished from slight and great care. Ordinary care is simply that care which any person of reasonable prudence and caution would be expected to exercise under the same or similar circumstances.

The degree of care, therefore, which the law requires a receiver to exercise in performing the duties of his office, which includes the

[1] Schwartz v. Keystone Oil Co. 153 Pa. St. 288.

[2] Barton's Executor v. Ridgeway's Administrator, 28 S. E. R. 226.

[3] State v. Gorch, 97 N. C. 186.

keeping of funds, is ordinary care, which is the measure of his liability in all things.[1]

The foregoing cases assert such to be the rule, but in the case of Ricks v. Broyler[2] especially it is intimated that a receiver ought not to deposit the funds in a bank at all. All persons of reasonable prudence deposit their money in bank. If a receiver should not deposit the trust funds in a bank and they should be lost, the fact would *prima facie* impute negligence.

The true rule is that if a receiver, exercising reasonable care in the selection of a bank, deposits the receivership funds, and they are lost by reason of the failure of the bank, he is not liable. This is the doctrine applicable to trustees generally.[3] But the receiver will be liable if he deposits the funds in his own name and mingles them with his own account; or if he makes the deposit to his individual credit, though he informs the officers of the bank that the money constitutes a trust fund, and he has no money of his own on deposit; or if he makes the deposit in any manner that would remove the fund from his exclusive control.[4]

A receiver was required by order of court to deposit all money in a certain bank, but instead of doing so a large amount of the money went into a firm, of which he was a member, and was used for partnership purposes. Some of the money was not accounted for to the court, but was received by the receiver from the firm, and misappropriated by him for his own use. It was held that the firm was responsible for such money; that a voluntary repayment of the money to the receiver, or its collection by him under ordinary circumstances, would not again reinvest him with its control as receiver and release the firm from responsibility; that as the money was used by the firm with the knowledge of its members, one of the partners could not avoid responsibility by saying that the firm had accounted for the funds by returning it to his copartner; and that the firm must account for the money.[5]

If a court make an order appointing a particular person depositary of the court funds, and such person, knowing of such order, accepts the deposit, it is said that "he unquestionably becomes *pro hac vice* an officer of the court. The court may order him to refund the money, and if he fails to do so, without showing some valid reason, may proceed against him as for a contempt. The same rule

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[1] Hamm v. Stone & Sons' Live-Stock Co. (Tex. Civ. App.) 35 S. W. R. 768.

[2] 78 Ga. 610.

[3] Perry on Trusts, 4th ed., § 443.

[4] The propositions asserted in the text are applicable to trustees in general; Perry on Trusts, 4th ed., § 443.

[5] Ryan v. Morrill, 83 Ky. 352.

would apply to a corporation; and if its officers, having control of its funds, and having the means of payment, * * * should refuse to pay, they too, might be proceeded against as for contempt."[1]

A receiver has no authority to invest funds without an order of court directing such disposition of them;[2] and if he receives any interest on any of the funds in his possession he must account for it.[3] To require a receiver to pay interest on the funds without any evidence or cause for such order, is erroneous.[4] He is not chargeable with interest as a matter of course, but only under certain circumstances.[5]

"While a receiver generally, as a trustee, is responsible only for the consequences of his own neglect and is protected when he acts in entire good faith in the management of the estate committed to him, yet the measure of duty and responsibility is to be found in the capacity in which he acts."[6] In the case cited it was held that where a receiver is a *quasi* guardian, required to keep money safely invested and bearing interest, which he may expend as income for the infants, he will be held to the same accountability as guardian, and will be liable for loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. Here the loan was made in another state and the loan was left for a considerable period without asking the advice of or making known to the court what the receiver had done.

Where a receiver was directed to lend the trust fund at six per cent on bonds secured by deed of trust on real estate, to run to himself, the same to become due upon default in the payment of interest, and make report of his doings, violated the order by loaning the money at eight per cent on notes payable to another and neglected to enforce the debt upon default, and to report to the court, he was held to be chargeable with resulting loss, even in the absence of bad faith.[7]

Where money is paid out by the receiver to a person apparently entitled to it, under order of the court, it has been said he cannot be compelled to pay the amount again.[8] A receiver has no authority to pay over money to any one without the order of

[1] *In re* Western Marine & Fire Insurance Co. 38 Ill. 289.

[2] Schwartz v. Keystone Oil Co. 153 Pa. St. 283.

[3] Lonsdale v. Church, 8 Brown Ch. R. 41.

[4] How v. Jones, 60 Io. 70.

[5] Crawford v. Fickey (W. Va.), 23 S. E. R. 662.

[6] State *ex rel.* Collins v. Gooch, 97 N. C. 186.

[7] Carr's Administrator v. Morris, 6 S. E. R. 613.

[8] Sullivan v. Miller, 106 N. C. 635.

court.[1] But when he is derelict in paying money to the person to whom he is ordered to pay it, he is chargeable with interest on the amount for the time it is withheld.[2]

An order directing a receiver to pay money to a certain person is a personal judgment or decree against the former.[3]

Section 310. **Of the Receiver's Duty to Preserve the Property in His Possession.**—It is the duty of the receiver to protect the property entrusted to him to the best of his ability; but, as the interests of the claimants are often various and conflicting and sometimes involved in doubt, he must keep it for all.[4] The agents and employees of a receiver in operating a railway are *pro hac vice*, the officers of the court. As such officers they are responsible to the court for their conduct, and if they willfully injure the property or endanger it, or seek to cripple its operation in the hands of the receivers, they can and will be made to answer therefor.[5] A railroad corporation is not liable for the negligence of the servant of a receiver who is operating the road. His possession is not theirs, and they cannot control either him or his employees.[6] A receiver holding a worthless certificate of stock cannot himself adjudge it void and yield it up to the person who pledged it. It is the duty of a receiver to use diligence for the retention of such a certificate, and as by holding it he does not transcend his duty, costs should not be imposed on him in an action for equitable relief.[7]

The receivers appointed by the governor of Tennessee, under an act of that state which authorized him to take control of railroads to whose construction state aid had been granted, when the companies failed to meet the interest on the bonds issued, were held to be public agents and, therefore, not responsible for the wrongdoings or negligence of their employees, but only for their own wrongful acts or negligence.[8]

Section 311. **Of the Power to Contract for Labor and Supplies —Duties and Liability of a Succeeding Receiver as to such Contracts.**—A receiver of an insolvent railroad corporation has authority,

[1] Duffy v. Casey, 7 Robt. 79.

[2] Johnson v. Moon, 82 Ga. 247.

[3] Crawford v. Fickey (W. Va.) 23 S. E. R. 662.

See further as to this subject section 322.

[4] Devendorf v. Dickinson, 21 How. Pr. 275, 277, citing Iddings v. Bruen, 4 Sandf. Ch. 417, 427; Commonwealth v. Young, 11 Phila. 606.

[5] *In re* Higgins, 27 Fed. Rep. 443 (1886).

[6] Memphis & Little Rock Ry. Co. v. Stringfellow, 44 Ark. 322.

[7] Bank of Indianapolis v. Middletown Nat. Bank, 1 N. Y. St. Rep. 772 (Sup. Ct., Gen. Term, 1886).

[8] Hopkins v. Connell, 2 Tenn. Ch. 323.

as necessarily incident to the duties imposed upon him, to make such contracts for labor and supplies as are reasonably necessary to enable him to perform the duties of his appointment, and his contracts for such purposes will bind the trust; but contracts made by a preceding receiver impose no legal duty or obligation on his successor, and damages cannot be recovered at law against the succeeding receiver for refusing to perform the contracts of his predecessor.

If the circumstances surrounding the particular transaction are such as to justify reasonable doubts respecting the validity or fairness of the contracts, it is the duty of the succeeding receiver to decline to perform them until he shall be directed to do so by the court.[1]

As a general proposition it may be asserted that a succeeding receiver is bound by the contracts of his predecessor.[2] Change in receiver does not change the identity of the receivership.[3]

Section 312. **Of the Duty to Collect Unpaid Stock Subscriptions.**— In a case where the legislature of Georgia had recognized and ratified the appointment of a receiver made by the stockholders of a corporation before the forfeiture of their charter, it was held that the duty of calling in the unpaid stock, to discharge debts, devolved upon the receiver, and that if he fraudulently combined with the stockholders and neglected or refused to do his duty, the proceeding might be maintained directly by the creditor in his own

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[1] Lehigh Coal & Nav. Co. v. Central Railroad Co. 41 N. J. Eq. 167, 175 (1886). In the opinion filed in this case Vice-Chancellor Van Fleet said: "The succeeding receiver occupies a fiduciary position. He is to protect the property and interests committed to his charge with a jealous vigilance; he is to exercise his best skill, sagacity and judgment in the discharge of all his duties, and if claims be asserted against the property in his custody, arising out of transactions which occurred prior to his appointment, and concerning which he has no personal knowledge, and which on examination appear to him to be questionable, his duty requires him to resolve his doubts against the claimant and in favor of the trust, and to refuse to recognize the claims as obligations of the trust until directed to do so by the court. * * * It would seem, then, to be obvious that the most that can be said in the way of laying down a general principle which will give the least support to the claim of the petitioners, is this — that the duties of a succeeding receiver, in respect to the contracts made by his predecessor, are only such as, in view of all the circumstances of the case, it would be equitable to impose — such as with the light before him he can perform without risk of personal liability and with safety to the trust."

[2] Vanderbilt v. Central Railroad of New Jersey, 43 N. J. E. 669; McNulta v. Lockridge, 137 Ill. 270; s. c. 141 U. S. 372.

[3] McNulta v. Lockridge, *supra*.

name against the stockholders, making the receiver a party defendant.[1] This subject will be more fully considered hereafter.[2]

Section 313. **Of the Duty and Liability as to Liens.**— A creditor who, at the time of the appointment of a receiver, has a lien, under the statute, for materials, machinery, etc., furnished, may record his contract, and thus fix and secure his lien, after the receiver has been appointed. The recording of the contract after the appointment does not newly encumber the property, but simply fixes and secures upon it an already existing lien.[3] Wherever property subject to a lien has been brought within the domain of a court of equity, and a receiver of that property is appointed, whatever rents and profits the receiver gets into his hands will be dedicated, along with the *corpus* of the fund, to the satisfaction of the lien after paying taxes, insurance and the like burdens.[4]

Where a judgment creditor acquired a lien upon a fund before the receiver obtained possession, it was held that such creditor was not, upon petition, entitled to an order upon the receiver to satisfy his judgment out of the fund, until after a decree had been made in the suit in which the receiver was appointed, and notice to the other creditors interested in the distribution of the fund; but that an order should be made directing the receiver not to disburse any portion of the fund without notice to the attorneys of the petitioner, and that he should be at liberty to institute such proceedings against the receiver as he may be advised, making such other parties as he shall see fit.[5]

In West Virginia, by statute, a decree against a general receiver of the court requiring him to pay out of funds then in his hands, to a party to the cause in which the decree is rendered, a certain sum on a future day, has the effect of a judgment for such sum of money with interest from the day on which it is to be paid, with a stay of execution until that day, and is a lien on the lands of such general receiver; the person entitled to the benefit of such decree is to be deemed a judgment creditor and may enforce his lien as other judgment creditors, by a suit in equity.[6]

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[1] Hightower v. Thornton, 8 Ga. 486. See Cook on Stock and Stockholders, section 208, where the subject is fully treated and the cases collected.

[2] See *infra* the chapter on suits by the receiver.

[3] Fagan & Osgood v. Boyle Ice Machine Co. 65 Tex. 324, 331, citing Huck v. Gaylord, 50 Tex. 580.

[4] Pepper v. Shepherd, 4 Mackey, 269.

[5] Hubbard v. Guild, 2 Duer (N. Y.) 685.

[6] Rickard v. Schley, 27 W. Va. 617 (1886).

Section 314. **Of the Duty and Liability as to Allowing and Paying Claims — Mistake.** — It is error to direct a receiver to pay debts out of property in his hands, even if they are entitled to priority of payment, until the claims are reported by a commissioner and allowed by the court.[1]

Under the former chancery practice in New York, it was the duty of receivers of a corporation appointed under the statute[2] to allow only such claims as were legal and just, and which might have been recovered against the corporation, either at law or in equity; and if the receivers disallowed a claim, and referees were appointed under the statute, the defence was managed by or under the direction of the receivers, and could not be compromised without their consent;[3] and where receivers are authorized to hear and determine the claims presented, they are to be governed by the rules of evidence in the admission or rejection of testimony.[4]

It was said by Lord Chancellor Cottenham, respecting a receiver: "If one even innocently pays money to other persons whom he supposes to be entitled in right of the parties in a cause, but who proves not to be so entitled, he will be responsible to such parties, inasmuch as in making such payments he departs from the strict line of his duty, and is, therefore, liable for any error he may commit."[5]

Section 315. **A Plaintiff is Not Liable for Losses Caused by the Receiver.**—It being well settled, as we have seen, that the receiver is the officer of the court who holds possession of the property in controversy for the benefit of all parties interested, and not for the plaintiff, at whose instance he was appointed, it follows that the plaintiff should not be held responsible for losses which result from his wrongful acts or negligence, there being no participation therein or fraud on the part of the plaintiff. The responsibility for such losses rests upon the receiver and his sureties.[6]

Section 316. **A Receiver is Not Liable for Acts Done Under an Order of Court.**—Out of the official character of a receiver as the representative and executive of the court in relation to the property held by him, is also developed the principle that he cannot

[1] Penn v. Whiteheads, 12 Gratt. 74.

[2] 2 New York R. S. 464.

[3] Attorney-General v. Life & Fire Ins. Co. 4 Paige, 224.

[4] Runyon v. Farmers' etc. Bank, 4 N. J. Eq. (3 Green) 480.

[5] McCan v. O'Ferrall, West H. L. 593, 616.

[6] Kaiser v. Kellar, 21 Iowa, 95. See also, generally, Ellicott v. U. S. Ins. Co. 7 Gill. 307, 320; Terrell v. Ingersoll, 10 Lea, 77; Downs v. Allen, Id. 652.

be held responsible for acts done by virtue of an order of the court. By applying this principle it has been held that no action can be maintained against a receiver in supplemental proceedings for rents collected in pursuance of the order by which he was appointed, notwithstanding the fact that the order was afterward reversed on appeal.[1]

In the same way, after the receiver has complied with an order to distribute funds of an estate among the creditors who proved their claims, he will be protected against the actions of other creditors for their claims or demands.[2]

Section 317. **Of the Liability for Using or Converting the Property of the Estate.**—Where the order appointing a receiver required that he should hire out slaves, and a successor to him was appointed "well and truly to perform the duties of receiver in the case and * * * to collect assets * * * and hire of property as heretofore ordered," it was held that his powers were intended to be co-extensive with those of the first receiver, and that it was contemplated he should hire out the slaves; and as he had received to his own use the benefit of their labor without hiring them out, he had thereby received a benefit from the trust property for which he was justly accountable. In this case Handy, J., said more broadly: "It is plain that, from the nature of his office, he had the power to hire out the slaves, though not expressly required to do so. They were placed in his hands for an indefinite time, and in all probability would remain there for years. During that period it would not have been proper to permit them to be unemployed, and they were capable of being productive of profit to those interested in them by their labor. It was, under such circumstances, his duty to make them profitable."[3]

If he loans out any part of the moneys which come to his hands as such receiver, even temporarily, to his friends or others, it is a breach of trust.[4] The taking and spending by a receiver for his own use, whether with or without the concurrence or advice of the other receivers, of any part of the funds in his possession as an officer of the court, is a gross breach of trust, tending to bring

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[1] Holcombe v. Johnson, 27 Minn. 353. In this case the court said the order "was valid until reversed, and furnished full protection to the defendant for acts done under it and in strict conformity with its requirements while it remained in force." To the same effect see Corey v. Long, 12 Abb. Pr. (N. S.) 427, 438.

[2] Keene v. Gaehle, 56 Md. 343.

[3] Battaile v. Fisher, 36 Miss. 321, 324.

[4] Utica Insurance Co. v. Lynch, 11 Paige, 520.

reproach, disgrace and distrust upon the administration of justice, and is a contempt of the authority of the court, punishable by fine or imprisonment, at the discretion of the court.[1] In such case the receiver cannot hope to escape punishment by saying he intended no wrong, or that from poverty he is unable to make repayment.[2]

Section 318. **Of the Liability of a Receiver for the Misconduct of His Co-Receiver.**—Where two receivers are appointed to close up the concerns of a corporation, and one of them illegally appropriates the funds in his hands, using them for his own profit, and the other negligently permits such illegal appropriation, they will be jointly liable for the balance found due from them, upon stating their account, with interest.[3]

Section 319. **Not Liable for Speculative Profits.**— When a receiver, whose duties are not specified by the order of the court, sells the property, instead of keeping it to await a further order, he can only be required to account for it on the basis of the actual sales and receipts, unless there was negligence, misconduct or bad faith, by reason of which the property was wasted, and did not realize its value; in the latter case he would be liable, not for probable or speculative profits, but for the value of the property.[4] A receiver, having a dwelling house in charge, who exercised his best judgment and in good faith pursued the plan which seemed to him to be the fittest for the purpose of producing revenue from the property, but failed to succeed, was held not to be personally liable for the rental of the property.[5]

Section 320. **Of the Liability of Receiver of Bank for Money Collected by It.**— While the only safe way for a receiver to pursue as to paying out money from the estate is, as we have seen, to do so only upon the order of the court whose officer he is,[6] the frequency of claims made upon the receivers, appointed to wind up banks or banking firms, for money collected by them, seems to warrant mention of the receiver's liability in this respect in this place. Whether or not the owners of money collected by an insolvent bank can successfully claim it as trust property, not being a part of the general assets of the bank, depends largely upon whether it has

[1] Cartwright's Case, 114 Mass. 230, 240.

[2] Ibid.

[3] Commonwealth v. Eagle, etc., Ins. Co. 14 Allen (96 Mass.) 344.

[4] Demain v. Cassidy, 55 Miss. 320.

[5] Hynes v. McDermott, 3 N. Y. St. Rep. 582, 586 (N. Y. Com. Pleas, 1886). But see Battaile v. Fisher, 36 Miss. 321, quoted in section 317, *supra*.

[6] See section 309.

been recognized as a special trust by being kept separate and distinct from the general funds of the bank or, by being mingled with them, has lost its identity. So it has been held that where an insolvent bank collected a draft sent to it for collection and so mingled the proceeds with its own funds that they could not be identified or distinguished, they could not be recovered from its receiver, but were a part of the general assets of the bank and their owner a general creditor.[1]

But this rule, so far as it relates to the separate keeping of the proceeds, is not uniformly followed, nor does it seem to be entirely reasonable. If it be clearly shown that the bank was merely the agent for collecting notes or drafts for another bank or individual, the better rule seems to be, as was recently stated by Vice-Chancellor Bird, of New Jersey, when, upon the application of the receiver of a bank for instructions as to paying the claim of another bank for the proceeds of a draft and notes sent and endorsed to it "for collection," he said: "I can see nothing in the argument respecting the impossibility of keeping the money separate when collected. The collecting bank could preserve its identity just as easily and as certainly as it could the note or draft collected. Nor can I see any force in the insistment that the entry by the collecting bank upon its books of the sum or sums collected changed the rights or relations of the parties. It would hardly be safe to say that an agent could make himself a debtor simply, as distinguished from agent, by a confusion of the moneys or goods of his principal, and by then giving his principal credit for their value or the amount collected. Any such doctrine would be dangerous in the extreme. * * * That banks may collect notes or drafts for each other, and in so doing establish a system of mutual dealing and thereby stand in the relation of debtor and creditor * * * is not questioned."[2]

Section 321. **The Same Subject Continued.**—But when, from the previous dealings between the parties, it may reasonably be inferred that their intention was that paper deposited for collection should be credited as a cash deposit, or, in other words, that it should be discounted by the bank, the proceeds will be held by the receiver as assets of the bank, even though paid to him after his appointment.

[1] Illinois Trust & Savings Bank v. Smith, 21 Blatchf. 275; s. c. 15 Fed. Rep. 858.

[2] Thompson, Receiver, v. Gloucester City, etc., Bank, 6 Cent. Rep. 328 (N. J. Ch. Fed. 1887), citing Hoffman v. First Nat. Bank, 17 Vroom. (46 N. J. Law) 604.

In a late case in the circuit court of the United States for the southern district of New York,[1] it appeared that the plaintiff had for several years kept an account with the Marine Bank, and on several occasions had deposited drafts along with money, which drafts were credited on the books of the bank and on the plaintiff's bank-book as cash items, though the plaintiff had never drawn against them nor had occasion to do so. After receiving a draft and crediting it as cash on his own books, though, by accident, not on plaintiff's bank-book, the bank failed and went into the hands of a receiver, who received the proceeds from the collecting agent at Boston, but not until after he had been notified of the plaintiff's claim. Wallace, J., in a suit for the proceeds, said: "Inasmuch as the proceeds of the draft had not become commingled with the other moneys of the bank, but were capable of identification, the plaintiff is entitled, if they are its property, to follow them into the hands of the receiver and regain them.[2] The question, therefore, is whether the draft belonged to the plaintiff at the time it was paid by the drawee. If it did, the defendant did not acquire title to the money. If the transaction in controversy was equivalent to a discount of the draft, the bank acquired title to the paper; if it was not, the bank merely became the agent of the plaintiff to collect the proceeds. * * * When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances. * * * The case is to be considered as one where the course of business between the parties implied the understanding of both that sight bills should be treated in their account as cash."[3]

Section 322. **Of the Receiver's Liability for Funds Deposited in a Bank.**[4]—If a receiver put the trust money to his own credit at his own banker, and it fail, he must bear the loss;[5] and if he make an arrangement with his bankers whereby he is to receive interest upon the balances to his credit as receiver, any loss result-

[1] St. Louis, etc., R. R. Co. v. Johnston, Receiver, 27 Fed. Rep. 243 (1886).

[2] Citing Illinois Trust & Sav. Bank v. Smith, 21 Blatchf. 275; s. c. 15 Fed. Rep. 858. See section 219.

[3] St. Louis & San Francisco R. R. Co. v. Johnston, receiver, etc., 27 Fed. Rep. 243 (1886), following and approving Metropolitan Nat. Bank v. Lloyd, 90 N. Y. 531, affirming s. c. 25 Hun, 101, as to the question of the title to the proceeds of the collection. Upon this point see a contrary decision, Balbach v. Frelinghuysen, 15 Fed. Rep. 675.

[4] See section 309.

[5] Wren v. Kirton, 11 Ves. 377.

ing from their failure must be borne by him.[1] There may be circumstances where the banker of a receiver will be liable for funds deposited. Thus, a receiver of an estate who has a private account at his bank, opened another there under the name of the estate and under such circumstances as to inform the bankers that the money which would be paid into that account would belong to the owner of the estate. The receiver drew a check on the estate account and paid it into his private account. The court held that the bankers were liable to repay the amount to the owner of the estate.[2] In an old case, where a receiver was to pay installments to a party who directed him to lodge them from time to time with a particular person, and the latter became insolvent before a certain installment was due, but which was in his hands — the receiver having lodged it a short period prior to the day the party had a right to receive it — it was decided that neither the receiver nor the party was liable for the loss.[3]

Where a court designated a savings bank as a depositary for the funds held by its officers, and the accounts were kept in the same way that other accounts were kept, it was held that a receiver of the bank, though appointed by the same court, could not be called upon to pay such deposits in full, since the officers of court were in no better position than the other depositors of the bank; nor did the fact that they did not receive interest upon their deposits, as did the other depositors, affect their rights in the premises.[4]

The payee of a draft upon a bank which is placed in the hands of a receiver before the draft is presented or paid, has no priority over other creditors of the bank unless he can show that it was drawn against a special fund, set apart in such manner that its equitable title was vested in him.[5] So, also, an ordinary check is not effective as an assignment of any part of the funds in bank if the receiver of the drawer has taken possession of the entire fund on deposit before its presentation, and the holder is not entitled to pay-

[1] Drever v. Maudesley, 13 L. J. (N. S.) Ch. 433; s. c. 8 Jur. 547. In this case the time for accounting for a part of the money deposited had not arrived, but the court said: "As he took the benefit of the interest which the bankers allowed on the balance, he must also be responsible for the loss" of that part.

[2] Bodenham v. Hoskyns, 21 Eng. Law and Eq. 643.

[3] Lady Shaftesbury's case, Prec. in Ch. 558; s. c. 2 Eq. Ca. Abr. 691. A full statement of the facts in this case and of the opinion may may be found in Edwards on Receivers, 592 *et seq.* See fully as to subject section 309.

[4] Otis v. Gross, 96 Ill. 612.

[5] People v. Merchants and Mechanics' Bank, 78 N. Y. 269.

ment in full from such receiver.[1] On the other hand, the receiver of a factor has been required to apply the proceeds of goods sold by the factor on a *del credere* commission, to the payment of the consignor's draft in the hands of third parties, on the ground that the goods remained the property of the consignor so long as they could be identified and were represented by the proceeds, which had been kept separate and distinct from other funds.[2]

Section 323. **Of the Receiver's Liability for Interest.** — Where a receiver was appointed by a state court in a suit which was subsequently removed to the circuit court of the United States, and reported to the latter, stating the amount of the fund in his hands, and asking for an order to pay therefrom certain liabilities, it was held that the circuit court had authority to require him to account for the fund, and that he was chargeable with interest on so much thereof as he on receiving, deposited in a bank to his credit as receiver, and then withdrew and deposited to his private account in another bank, he declining to explain the transaction when he was examined as a witness by the master to whom the court had referred his account.[3] So, also, when a receiver did not keep the trust fund separate, but mingled it with his own moneys in the bank where he kept his account in his own name, and drew out and used large sums of such fund from time to time by loaning the same to his friends and otherwise, he was ordered to pay simple interest on the amount of the fund with annual rests.[4] A receiver has been ordered to account for any benefit or interest which he might make out of the money in his hands.[5]

It is the common practice to direct trustees and receivers to pay to the creditors a due proportion of the interest which has accrued or may accrue.[6] And where a receiver improperly retains a balance in his hands and does not regularly pass his accounts, he must pay interest on the amount unless he shows a special case of exemption.[7] Lord Chancellor Eldon said: "I will have receivers know that, if they do not pass their accounts, they shall

[1] Attorney-General v. Continental Life Insurance Co. 71 N. Y. 325. And see Butler v. Sprague, 66 N. Y. 392.

[2] Francklyn v. Sprague, 10 Hun, 589. See further as to this subject section 309.

[3] Hinckley v. Railroad Co. 100 U. S. 153, 156, 157.

[4] Utica Insurance Co. v. Lynch, 11 Paige 520

[5] Hooper v. Winston, 24 Ill. 353, 367; (Breeze, J.) citing Shaw v. Rhodes, 2 Russ. 539.

[6] Trayhern v. National Mechanics' Bank, 57 Md. 590, 600.

[7] Harman v. Foster, 1 Hog. 318; *in re* Carter, 3 Paige, 146; *in re* Seaman, 3 Paige, 409; Harrison v. Boydell, 6 Sim. 211.

always pay interest."[1] And this would be done in England, where a receiver keeps money in hand even a quarter of a year after it ought to be accounted for and paid in.[2] In New York it has been lately decided that a receiver in supplementary proceedings will not be charged with interest upon a fund in his hand without proof either that the interest was earned or that he was negligent in not receiving interest.[3]

Section 324. **Of the Receiver's Liability for Costs of Litigation.**—Where a receiver institutes proceedings without the permission of the court, after a rule or order relating to the same subject-matter had been made, the court has power to determine whether the costs shall be paid out of the funds in the hands of the receiver or by him personally; and in such a case the successful party is not required to make an affirmative motion to determine whether he should be personally charged with the costs.[4]

Pending the litigation it is not the duty of a receiver to pay the costs and expenses incurred by the plaintiff in the suit instituted for a foreclosure, in which the receiver was appointed. It may be that the plaintiff's demand, from the beginning, has been wrongful, and, if so, whatever has been done at his instance, must be at his expense. So a federal court has sustained exceptions to a master's report concerning claims allowed by a receiver for costs and expenses incurred by the plaintiff, with leave to present the same as the final determination of the equities might require.[5] He is entitled to the protection of the court against loss for disbursements made by himself as receiver, which were such as a reasonable and prudent man would have been justified in expending.[6]

Where a judgment was obtained against a receiver, in a suit originally brought against the corporation of the property of which he was appointed, but which was defended by him, it was adjudged that the costs attending the suit and an allowance should be paid by him out of the fund, since they were incurred for the benefit of the fund out of which all other claims entitled to preference had been paid, and that this was not giving preference to a debt as such, but only requiring the fund to pay an expense incurred for its own benefit.[7]

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[1] Blank v. Jolland, 8 Ves. 72.

[2] Fletcher v. Dodd, 1 Ves. jr. 85.

[3] Syracuse Savings Bank v. Hess, 28 Weekly Dig. 280 (Sup. Ct. 1885).

[4] Matter of Castle, 2 New York St. Rep. 362 (Sup. Ct. 1886).

[5] Olyphant v. St. Louis Ore & Steel Co. 22 Fed. Rep. 179.

[6] Adams v. Haskell, 6 Cal. 475.

[7] Locke v. Covert, 42 Hun, 484 (1886).

When a receiver prosecutes an action for recovery of money for the enhancement of the fund for which he is receiver, and fails to recover, the defendant is entitled to costs; and is not bound to await the final administration of the fund and, as a general creditor, share with other parties interested therein, *pro rata*, but is entitled to an immediate order for payment of the costs out of any funds in the hands of the receiver. This is true where the receiver continues the prosecution of an action begun by the insolvent company before his appointment. Such is the rule with or without the code of procedure.[1]

Where in a suit by a receiver against several defendants, one of them successfully defended the suit, it was held the receiver was not personally liable for the costs of such defendant, unless ordered by the court to pay them for mismanagement or bad faith in conducting the action.[2] A receiver having been appointed for a corporation without authority of law, having appealed from an order of another court refusing him possession of the corporate property, was held not liable for the costs of the appeal; but because of particular circumstances attending the appeal.[3] Where receivers of the property of a bank continued a suit at law commenced by the bank, and were non-suited, it was held that the defendant was entitled to all his costs out of the fund in the receiver's hands, down to the time of the non-suit, but not for making up the record, and issuing an execution at law against the bank.[4]

If upon the examination of the accounts of a receiver and the vouchers relating thereto, no misconduct of the receiver be shown, he is not chargeable with the expenses of the accounting.[5]

Section 325. **Personal Liability After Order of Restitution of Costs in New York.**—Where a receiver, who had obtained a judgment in his favor at special term, which was upheld by the court of appeals, entered a money judgment for the costs, which were thereafter paid to the sheriff and by him turned over to the receiver's attorney, who retained the same, the amount being composed of disbursements made by the attorney personally and his taxed costs, and the court of appeals subsequently modified its judgment, disallowing the costs, whereupon the special term granted an order of

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[1] Columbia Insurance Co. v. Stevens, 37 N. Y. 536.

[2] Marsh v. Hussey, 4 Bosw. 614.

[3] Tull's Appeal, 159 Pa. St. 603.

[4] Camp v. Niagara Bank, 2 Paige, 283.

[5] Hynes v. McDermott, 3 New York St. Rep. 582, 586, (N. Y. Com. Pleas. 1886).

restitution to the defendant, holding the receiver and his attorney liable personally for the repayment of said costs,[1] it was held, on appeal, that granting the order was within the judicial discretion of the court; that the money thus paid to the receiver's attorney was, in effect, as if it had been first paid to the receiver himself, and by him paid to his attorney in satisfaction or reduction of the attorney's claim against the receiver individually, for professional services rendered in the litigation, and the order was affirmed so far as it held the receiver personally liable, but reversed as regards the attorney's liability. It was also held that the order should not require the attorney to repay the costs, or any part thereof, to the defendant.[2]

Section 326. **Of the Receiver's Liability for Rents.**—A receiver must make good to the estate any rent which has been lost by his neglect.[3] In the old court of chancery of New York it was held, that, if a receiver did not take possession of the premises wherein the parties of whose property he was appointed carried on business, and got into his possession no assets upon which the landlord had a right to distrain, the landlord had no preference over other creditors; and, in such a case, a petition asking that the receiver might pay the rent was denied.[4]

In a later case in the same state, however, a receiver who took possession of premises leased to the corporation over whose property he was appointed, was directed to pay the rent thereof; and as the facts were not disputed, the court made the order without first referring the matter to a master to ascertain the facts.[5] Similarly in Massachusetts, the liability of receivers for rents upon leases executed by the parties whose property they hold, depends upon whether or not they take possession of the leased premises.[6]

Section 327. **The Effect of Appointment of Receiver on Lease of Defendant—Liability of Receiver Under Lease.**—The question as to the effect of the appointment of a receiver on a lease held by the defendant, has been frequently considered, especially in receiverships of railroads; and the subject of this section is considered more at length in the following chapter, which concerns receivers of railways.

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[1] Under the New York Code Civil Proc. § 1323.

[2] Wright v. Nostrand, 53 N. Y. Super. Ct. 381, 386 (1886).

[3] *In re* Skerretts, 2 Hog. 192.

[4] *In re* Brown, 3 Edw. Ch. (N. Y.) 384.

[5] People v. Universal Life Insurance Co. 30 Hun, 142.

[6] Commonwealth v. Franklin Insurance Co. 115 Mass. 278 — a case which turned upon the question whether or not the receivers had elected to take the leased premises.

The mere appointment of a receiver does not constitute him an assignee of the lease and render him liable on its covenants. Nor by taking possession of the leased premises are the receivers to be regarded as assignees of the term.

They are entitled, as put by Judge Jenkins of the federal court, to "a breathing space to determine whether or not they will assume the covenants of the lease." [1]

When appointed and qualified it is the duty of a receiver to take possession of leased property, if included within the order of the court; but he does not, by so doing become the assignee of the term, but holds the property as the hand of the court, and is entitled to a reasonable time to ascertain its value and determine whether or not he will accept it.[2] But the receivership is liable for the rent during the occupancy and use of the property by the receiver.[3]

A receiver does not become liable for rent for leased premises without taking possession thereof, and doing some act signifying his election to accept the term as a part of the property of the judgment debtor.[4] In the case cited this was said: "The situation of the receiver in this case is analogous to that of an executor, who cannot be charged as the assignee of the lease if he waives the term, the income of which is not sufficient to pay the rent, although the estate of the testator may be liable for the rent in the due course of administration if the landlord refuse to re-enter."

A receiver has a reasonable time in which to elect whether he will accept or reject a lease wherein the party whose estate he represents is lessee, and during such reasonable time he may enter upon and occupy the premises for the purposes of selling, under the direction of the court, personal property thereof belonging to the trust estate, without thereby accepting the lease of the estate; but the lessor is equitably entitled to be paid for the use of the premises during such time at the stipulated rent.[5]

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[1] Farmers' Loan and Trust Co. v. Northern Pacific Railroad Co. 58 Fed. R. 257.

[2] Quincy, Missouri and Pacific Railroad Co. v. Humphreys, 145 U. S. 82; New York, Pennsylvania and Ohio Western Railroad Co. 58 Fed. R. 268; Park v. New York, Lake Erie and Western Railway Co. 57 Fed. R. 799; United States Trust Co. v. Wabash Western Railway Co. 150 U. S. 287; Central Trust Co. v. Wabash, St. Louis and Pacific Railroad Co. 34 Fed. R. 259; Clyde v. Richmond and Danville R. R. Co. 63 Fed. R. 21; Bell v. American Protective League (Mass.), 40 N. E. R. 857.

[3] Frank v. New York, Lake Erie and Western Railroad Co. 122 N. Y. 197,

[4] Martin v. Black, 9 Paige, 641.

[5] *In re* Bishop (Minn.), 62 N. W. R. 335.

Where there has not been a default by the defendant in paying the rent the lessor cannot recover anything on account of the lease out of the assets in the possession of the receiver, though the term has not expired.[1] This was said in the case cited, which was a receivership of a national bank: "The lease was necessarily terminated becaue the lessee had ceased to exist, and had no successors, who in the eye of the law, stood in its place. Now, if there had been a default at the time of the appointment of the receiver, and of his taking possession of the premises, that claim might have been proven against the receiver. But there is no such claim. The claim is subsequent."

In order to bind a receiver on a lease to the defendant, he must have elected to accept it. By merely taking possession of the property rented he does not become the assignee of the term, and the rents accruing after his appointment until the confirmation of the sale of such lease do not constitute a prior claim on the funds in his hands.[2]

Section 328. **Liability of Receivers on Contracts of Defendant.**— The law upon the subject of this section is thus clearly stated by the supreme court of the United States: "The general rule applicable to this class of actions is undisputed that the assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. If he elects to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and the privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent." Reasonable time to ascertain the situation of affairs is to be given the receiver.[3]

A receiver does not, simply by virtue of his appointment, become liable on the covenants and agreements of the debtor defendant. He is entitled to a reasonable time in which to elect whether he will adopt the contracts of the debtor and make them his own, or whether he will reject them.[4] Nor is a receiver obliged to per-

[1] Fidelity Safe Deposit and Trust Co. v. Armstrong, 35 Fed. R. 567.

[2] Tradesmen Publishing Co. v. Knoxville Car Wheel Co. (Tenn.), 32 S.W. R. 1097.

[3] United States Trust Co. v. Wabash Western Railroad Co. 150 U. S. 287.

[4] Sunflower Oil Co. v. Wilson, 142 U. S. 313; *In re* Seattle, Lake Shore & Eastern Railway Co. 61 Fed. R. 541; Kansas Pacific Railway Co. v. Bayles (Colo.), 35 Pac. R. 744.

form executory contracts of the defendant. He may disregard them.[1] The court may empower the receiver to perform existing contracts of the defendant.[2]

The appointment of a receiver is not for the purpose of performing the defendant's contracts, but to preserve and protect the property committed to him.[3]

But the supreme court of Texas has declared that it is erroneous to assert that a court appointing a receiver is under no obligation to continue in force and, in some cases, cause to be performed the personal contracts of the defendant; that "the continuance of the obligation of contracts is not dependent on the will or act of the court, nor can a court in any proper case refuse to execute them."[4] It was also said: "It is true, however, that it is not every contract the company may have made which the court * * * will cause to be satisfied out of the funds subject to its control; for that must depend on the right to be paid out of the earnings or proceeds of the property in the hands of the court." It was correctly asserted that where the receiver enjoys the benefit of a contract he must assume its burdens.

In the case cited, and from which we have quoted, there was in controversy the right of a receiver of a railroad company to disregard and reject this contract: the railroad company had agreed that if the plaintiff would give a right of way it would erect and maintain a water tank on plaintiff's land, which was to be supplied with water from a spring thereon; and that the company would pay the plaintiff as much per month as any other person for like privilege and service to it. The receiver ceased using the water, but without the direction of the court to do so. It was held that had application been made to the court for leave to discontinue the use of and payment for the water, it could not, in good conscience, have been granted without compensating the owner of the land for expenditures and loss that would be sustained by reason of breach of the contract, and that the plaintiff was entitled to judgment. But the correctness of the court's conclusion is because of the fact that the company, or its receiver, was in possession of and using the right of way; hence was applicable the proposition asserted by

[1] Scott v. Rainier Power & Railway Co. (Wash.), 42 Pac. R. 531; United Electric Security Co. v. Louisiana Electric Railway Co. 71 Fed. R. 601.

[2] Florence Gas, Electric Light & Power Co. v. Hanby (Ala.), 13 So. R. 343.

[3] Brown v. Warren, 78 Tex. 543; Commonwealth v. Insurance Co. 115 Mass. 278; *In re* Brown, 3 Edward's Ch. 484: Ellis v. Railway Co. 107 Mass. 1.

[4] Howe v. Hardy, 76 Tex. 17.

the court, that when a receiver enjoys the benefit of a contract, he must assume its burdens.

The rule which gives to the receiver the right to adopt or reject the contracts of the defendant is not reciprocal, and hence is anomalous. It does not matter how burdensome the contract may be to the latter, he must render performance, if the receiver so demands. The power to adopt or reject the defendant's contracts, to accept those which are of advantage to the trust estate, and reject the burdensome ones, is restricted to the receiver. This rule not infrequently moves the defendant to consent to and even seek the appointment of a receiver. It furnishes an efficient mode of being relieved of unprofitable and embarrassing executory contracts. This is especially true of corporations.

Section 329. **Of the Receiver's Liability on His Own Covenants and Contracts.**—If a receiver, in the course of his duty, enters into a covenant or executes an instrument by virtue of his office as receiver, he cannot be held liable personally upon it. This principle was illustrated in a case, in which a receiver of a bank sold certain judgments, being a part of the assets of the bank, and in the assignment executed by him in his official capacity, covenanted that they were due and unpaid. In a suit against the receiver personally and not as receiver, to recover upon the covenant, it was presumed that the purchaser's intention was to deal with him officially, and a nonsuit was ordered.[1]

A person appointed by the governor of Tennessee as receiver of a railroad, under the Internal Improvement acts of that state, is a public agent, and not liable individually on contracts made as such, where he has not pledged his own credit.[2]

The contracts of a receiver made with either express or implied authority, cannot be annulled or revoked at the pleasure of the court.[3] A contract made by the receiver with the authority of the court must be performed by him, and the court should see that it is performed. "The court," said Brewer, C. J., "should be chary of promises, eager of performance."[4]

A receiver is liable for contracts made in his official capacity and for the torts committed by his servants and agents.[5]

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[1] Livingston v. Pettigrew, 7 Lansing (N. Y. Sup. Ct.), 405. See also Ellis v. Little, 27 Kan. 707.

[2] Newman v. Davenport, 9 Baxter (Tenn.) 538, 540.

[3] Vanderbilt v. Central Railroad of New Jersey, 43 N. J. E. 669.

[4] Farmers' Loan & Trust Co. v. Burlington and Southwestern Railway Co. 32 Fed. R. 805.

[5] Brown v. Warren, 78 Tex. 548.

Section 330. **Of the Liability for Loss Caused Solely by the Default of Another.**—The receiver, in managing the property under his control, is required to use the same diligence and care which are exercised by prudent men in similar circumstances. If he does so, he will not be held for losses which are made by the default or negligence of others. So it has been held that, if he entrust the collection of debts due the estate to others, in whose integrity and capacity he has confidence, after making proper inquiry, he will not be liable for their misconduct in not paying the proceeds to him.[1] And in an old case, in which a receiver, rightly deeming it unsafe to send a large amount of money in specie to London, bought bills of exchange from a tradesman who was in good standing and credit, Lord Chancellor Hardwicke refused to oblige the receiver to make good the loss occasioned by the tradesman's bankruptcy, because it "was not owing to any default of his;" but he intimated that the ruling would be otherwise if it appeared that the receiver was guilty of any collusion or fraud, or if he had placed the money knowingly in improper hands.[2]

Section 331. **Of the Liability to Pay for Labor and Materials Furnished.**— Where it had been decided that the property and funds in the hands of a receiver of a manufacturing business should be first applied, after the payment of costs, etc., to the payment of the debts fairly incurred in carrying on the business, including, presumably, the claims of employees for their wages, and it appeared probable that the property would be sufficient to pay all claims of that class, an order directing payment of such employees in preference to all other creditors was reversed.[3]

The receiver of a railroad company will be directed to pay claims made on account of material furnished to and accepted by him as such receiver, they being either admitted by him to be due or properly verified and presented for payment, and if any reason exists why such claims should not be paid, the burden of showing it rests upon the receiver. In directing such claims to be paid, a sufficient sum will be reserved from the amount due to cover the receiver's claim to a set-off, the amount of which is to be subsequently determined.[4] Claims for property destroyed by fire set by sparks from locomotives prior to the appointment of the receiver in fore-

[1] Powers v. Longbridge, 38 N. J. Eq. 396; Union Bank Case, 37 N. J. Eq. 420, affirmed, *sub nom.* Sandford v. Clarke, 38 N. J. Eq. 265.

[2] Knight v. Plymouth, 3 Atk. 480.

[3] Case v. Fredrickson, 63 Wis. 501.

[4] Vanderbilt v. Receiver of N. J. Central R. R. Co. 2 Cent. Rep. 228 (N. J. Ch. 1886).

closure proceedings, but subsequent to default of the railroad company in the payment of the mortgage debt, do not come under the head of operating expenses, to be paid from the earnings of the road in the hands of the receiver, and cannot be allowed against the receiver.[1]

Section 332. **Of the Liability for Endangered Wall Under the New York Statute.**— It has recently been decided by the court of appeals of New York that the provisions of the Consolidation Act[2] requiring the owner of a wall endangered by the excavation of an adjacent lot to make it safe, does not cast that duty upon a receiver who has been appointed in foreclosure proceedings to collect the rents of the endangered building; and where the party excavating the adjacent lot proceeds to make the wall safe, without the permission of the court, it lies in the discretion of the court to allow the receiver to reimburse him for such work and no appeal will lie from its refusal.[3]

Section 333. **Of the Disposition of Assets Under the New York Statutes.**— Under the statutes of New York the receiver of an insolvent corporation is bound to apply the assets, or their proceeds, remaining in his hands after the payment of debts entitled to a preference under the laws of the United States, and judgments so far as they are liens upon the real estate of the corporation, equally among all its other creditors as their demands existed at the time of his appointment, and no authority has been given to the receiver, or to the courts regulating his proceedings, by which one class of creditors shall be wholly or partially excluded from their proportionate part of the assets of the company by reason of previous payments made upon their debts before the appointment of the receiver.[4]

Section 334. **Of the Duties of Receivers Appointed by the Courts of the United States, Under Act of Congress of March 3, 1887.**—The act of congress of March 3d, 1887, provides as follows: "That whenever in any cause pending in any court of the United States there shall be a receiver, or manager, in possession of any property, such receiver or manager shall manage and operate

[1] Hiles v. Case, 9 Biss. 519.

[2] Laws of N. Y. 1882, ch. 410, § 473 — the Charter of the Corporation.

[3] Wyckoff v. Scofield, 103 N. Y. 630, 632; s. c. 9 N. E. Rep. 498; s. c. *sub nom. In re* Maddock, 5 Cent. Rep. 791 (Ct. of App. 1886), affirming s. c. 53 N. Y. Super. Ct. 237.

[4] People v. Universal Life Insurance Co. 42 Hun, 616 (1886).

such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding $3,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."[1]

This section of the act has not yet received any considerable attention. It has been said of it, that it "was intended to correct abuses that had grown up under the old practice."[2]

Section 335. **Of the Liability of Persons Improperly Acting as Receivers.**—After the death of a receiver, a solicitor who received rents and rendered accounts in the form of receiver's accounts, was, in an English case, held responsible for such rents as had been lost through his neglect. Lord Chancellor Lyndhurst said: "This gentleman seems to have taken upon himself to act as receiver; and, from his conduct, the parties had every reason to believe that he had been appointed by the court to succeed the former receiver. My opinion is that if a solicitor in a cause, having assumed to himself improperly the character of a receiver, neglects the duty of a receiver, and does not properly collect the rents, while the parties consider him to be acting as receiver, he makes himself responsible for any of the rents which are lost in consequence of his neglect."[3] It is evident that the same responsibility would be imposed upon any other person, who, by impersonating a receiver, or by acting in the capacity of a receiver without proper and lawful authority, should obtain possession of the property or funds of the estate in litigation.

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[1] Act of March 3, 1887 (Removal of Causes), section 2; 24 U. S. Stats. 554. See section 383.

[2] Central Trust Co. v. St. Louis, Arkansas & Texas Railroad Co. 40 Fed. R. 426.

[3] Wood v. Wood, 4 Russ. 558.

CHAPTER XII.

RECEIVERS OF RAILROADS.

I.

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I.

Of The Appointment Generally.

Section 336. **Importance of the Subject — Special Care in Granting the Remedy.**— In this chapter we shall consider such matters as are peculiar to railway receiverships, but the careful practitioner will not overlook the fact that the general rules of law concerning receiverships are equally applicable to the receivership of railways. There are, however, some features and phases of this class of receiverships which are not common to others; and so extensive and important has the subject of this chapter become that it

merits and requires special consideration. Attention is specially directed to the chapter upon the eligibility of persons for receivers, the conflict between courts in appointing receivers, and receivers of corporations and of mortgaged property.

The care which courts should exercise in resorting to this remedy in any case, is especially obligatory when the property of a railroad is involved. The magnitude of the monetary interests, the number of persons directly and indirectly concerned in the operation of the road, whether as officers, employees, creditors or the general public, afford, *in se*, sufficient reason for abundant caution in working a change in the possession of the property, and a revolution in the business policy of the corporation. But when to this are added that corporate franchises are often dependent upon the continued operation of the railroads; that in other cases the state which incorporates them retains a reversionary interest in the property upon the expiration of their charters; that nearly all of them are carriers of the mail, and subject to regulation by the federal government; that frequently they control large tracts of land granted to assist in their construction; that as common carriers they are liable in damages for accidents, unnecessary delays, etc., and that, in all cases, their management requires an experience and technical knowledge which practically constitute their officers a distinct profession, we find imposed upon the court which is asked — it may be upon an *ex parte* application — to take the property out of the possession of those to whom it is entrusted by the act of its owners, and place it in that of its own officer, the receiver, a responsibility which calls for its utmost care and most deliberate judgment.

Our courts have frequently given expression to their appreciation of the gravity of their action in making appointments of receivers to manage such property. Thus, in Virginia, it was said that a court of chancery is reluctant to appoint a receiver to manage a railroad, but will do so when it is indispensable to secure the rights of the legitimate stockholders and prevent a failure of justice.[1]

The receivership of a railway has been declared to be "a trust of a somewhat unusual, but entirely salutary character."[2]

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[1] Stevens v. Davison, 18 Gratt. 819. And see, generally, Overton v. Memphis & Little Rock R. R. Co. 10 Fed. Rep. 866; s. c. 3 McCrary, 436; Meyer v. Johnston, 53 Ala. 237: Kelly v. Trustees, 58 Ala. 489; Milwaukee & Minnesota R. R. Co. v. Soutter, 2 Wall. 510; s. c. Woolw. C. C. 49; Wallace v. Loomis, 97 U. S. 146.

[2] Clarke v. Central Railroad & Banking Co. 54 Fed. R. 556.

Section 337. **Under What Circumstances Appointment Will be Made — Caution — Notice.** — The appointment of a receiver of railways is almost exclusively incident to proceedings to foreclose mortgages; but they may, of course, be appointed on the application of creditors and stockholders, and those possessing claims against a company which constitute a lien on its property.

No principle concerning the receivership of railways is more firmly established than that the appointment of such receivers is not a matter of right, but, like the appointment of receivers, generally, is wholly within the sound judicial discretion of the chancellor, which is at all times to be cautiously exercised, and the application granted only in cases of extreme necessity.[1]

Further on in this chapter the circumstances which justify the appointment of receivers of railways in foreclosure proceedings are particularly considered; and this topic is also discussed in the chapter upon mortgages. In this section it is intended only to speak generally of the conditions attending the appointment of such receivers.

In a suit on promissory notes, being a mere action at law, there cannot be any circumstances authorizing the appointment of a receiver for a railroad company, for the jurisdiction belongs wholly to the powers of a court of equity. Hence where, in such an action, it was alleged that the company was insolvent, that other creditors were threatening to sue, and that the collection of the plaintiff's judgment would be prevented, the application for a receiver was denied, though the company appeared and consented thereto.[2]

Upon the subject of this section the supreme court of the United States has said: "Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of *quasi* public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises."[3]

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[1] Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad, 53 Fed. R. 182. See article by Hon. H. C. Caldwell, circuit judge eighth federal judicial circuit, upon "Railroad Receiverships," 30 Am. Law Rev. 161.

[2] Smith v. Superior Court, 97 Cal. 348.

[3] Sage v. Memphis & Little Rock Railroad Co. 125 U. S. 361. In this case the facts were these: Russell Sage secured a judgment by confession against the Memphis & Little Rock Railroad Company in the United States circuit court, eastern district of Arkansas. On the same day of the judgment, he commenced his suit in a state court against the railroad company, alleging his judgment, that the road was heavily mortgaged; that it was not advisable to sell the road under execution; that if the company's property was held together and carefully managed it would produce a large income, more than suffi-

In another case the application of a judgment creditor for the appointment of a receiver of a railway was refused because, by the terms of the mortgage covering the property, all the net income of the company was to be applied to its payment.[1]

Claims for labor performed for a railroad company, though to be paid in preference to a mortgage, do not entitle the parties to the appointment of a receiver until reduced to judgment.[2]

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cient to pay the operating expenses, and leave each year a balance to pay on his debt; that the company had failed and refused to apply its surplus income to the payment of its debts and would continue in such course unless prevented, and would apply its surplus to other uses to his great injury and loss. The relief asked was that the court take possession and operate the road by a receiver and in that manner seize upon the only means in the reach of the law for satisfying his demand; such relief to be subject to all the rights and equities of the holders of bonds or of the trustees in the mortgages. A receiver was appointed who took possession of the railroad property and operated it.

Afterwards stockholders of the company intervened and assailed the proceedings in which the receiver was appointed, charging fraud and collusion between Sage and the railroad company. The cause was removed to the federal court, where an order was entered requiring the receiver to at once surrender to the railroad company all the property of whatever kind in his possession as receiver; to pay out of the money in his hands all sums and dues authorized by the order appointing him; to retain the balance subject to the order of the court, and to make full report of his acts. The order imposed the condition that the railroad company should assume all the liabilities of the receiver and agreed to pay and discharge them and to pay and discharge all demands that might be legally established against the receiver. The condition was accepted.

Thereupon the plaintiff Sage filed a petition praying that the receiver, out of the funds in his hands, pay his judgment in the bill mentioned, which was refused. It was held that Sage was entitled to a preference out of the funds in the hands of the receiver to the extent of his judgment, and that the mortgagees would not be entitled to the net earnings of the road. It was said that the appointment was within the power of the state court and was not a nullity.

[1] Smith v. The Post Dover & Lake Huron Railroad Co. 12 Ontario App. 288.

[2] Putnam v. Jacksonville, Louisville & St. Louis Railway Co. 61 Fed. R. 440.

Where a judgment creditor of a railroad company petitioned for the appointment of a receiver, that he might have an equitable execution of his judgment and receive part of the earnings of the debtor corporation, it was held that, in the absence of statute, the court will exercise its jurisdiction as to appointing a receiver only upon a proper case being made out for the exercise of its jurisdiction according to well established principles; that the application should be denied because it was neither just nor convenient that a receiver be appointed to receive the income of the road to do with it what the company must do with it, to wit: apply it to the payment of incumbrances on the property; second, because there was no reason to suppose that there was anything to receive in which the plaintiff could be interested; third, because though the bondholders were not in actual possession, the whole income of the road was applicable to and was being applied towards reducing the incumbrances. Smith v. The Post Dover & Lake Huron Railroad Company, 12 Ontario App. 288.

Notwithstanding the doctrine that the power of a court of equity should be cautiously and sparingly exercised, and never at all except in cases of extreme necessity, there are many instances which evidence the alacrity of chancellors to go into the railroad business. To such an extent have courts gone in the exercise of this extraordinary jurisdiction that the supreme court of the United States has declared that it is time to stop and consider.[1]

The appointment of receivers of such corporations has been made in *ex parte* proceedings under circumstances that constituted the action of the chancellor most arbitrary and unwarranted, and a flagrant violation of the rule of notice.[2] A case wholly within this criticism was recently presented in Missouri. A minority stockholder of the St. Louis, Kennett and Southern Railroad Company, its line of road being entirely within the jurisdiction of the state, presented an application to a judge of the state circuit court for a receiver, which was immediately granted, and without any notice or the least intimation to any officer of the company that such was to be done.

After an effort which practically stopped the operation of the road for several days the receiver succeeded in obtaining possession of the property.

An application was immediately made to the state supreme court by the company for the writ of prohibition to be directed against the court which appointed the receiver, which was speedily granted, resulting in a partial possession of the road being returned to the company.

Not satisfied with his experience in the state courts the minority and complaining stockholder applied to the federal court at St. Louis for a receiver of the railway, which was promptly granted by the district judge, and also without any notice of the application having been given.

On motion in the federal court to vacate its order of appointment, Adams, D. J., asserted that on the rights of the plaintiff, "as stated by him in his bill," he was not entitled to the appointment of a receiver. This was a surprising concession, and evidences a judicial disregard of the principle requiring the exercise of caution and care in considering an application for such a harsh and drastic measure, especially when made by a minority stockholder.[3] Surely it is time for chancellors to "stop and consider."

The motion in the federal court to vacate the order of appoint-

[1] Barton v. Barbour, 104 U. S. 126.

[2] See section 148.

[3] See section 424.

ment was sustained, Judge Adams delivering an able and elaborate opinion, in which well-established principles pertaining to the law of receiverships were clearly asserted and enforced.[1]

Section 338. **Of the Selection of the Receiver—Eligibility.**— The subject of this section has been considered and discussed in previous sections both generally and in reference to receivers of railways,[2] and there is but little further to be said of the matter here.

In the selection of the second receivers of the Northern Pacific Railroad Company[3] Judge Jenkins innovated upon the practice of selecting as receivers persons not only residing far away from the territorial jurisdiction of the road, but a long distance from the road itself, by appointing as receiver a resident of St. Paul, where the principal officers of the company are located, and a resident of Milwaukee, which is within the territorial jurisdiction of the court. As to the residence of the receivers Judge Jenkins said: "There would seem to be a certain propriety that both of these receivers should be residents of the city of St. Paul, that they might readily co-operate with all the general officers of the road. This idea has impressed me strongly. But, upon the contrary, the thought has occurred to me that at least one of these receivers should reside within the jurisdiction of the court and be in close touch with the court. I have anxiously considered these two opposing ideas, and I have concluded that, under all the circumstances surrounding this case, it is proper and right that one of these receivers should be resident within the jurisdiction of this court. The objection, that the business cannot as well be performed as if they were both residents of one city, is not controlling. It has seldom, if ever, been considered essential in the case of receiverships of transcontinental lines. Ordinarily it has been deemed necessary that one or more of the receivers should be resident of great financial centers, like New York. Certainly the objection, if it be valid, is minimized by the fact that a night's journey would put these parties in personal communication."[4]

The writer knows that the appointment of receivers of railroads who reside and pass their time out of reach of the court and those

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[1] The case to which reference is made is entitled Kerfoot v. Houck, the opinion in which is marked "not for publication," and will not, therefore, be published.

[2] Sections 33 and 34.

[3] See opinion in full, note to section 33, page 49.

[4] Opinion not published, but is given in full in note to section 38, page 49.

having official business with them has been criticized by eminent members of the bar, and this with reason and justice.

The supreme court of Missouri recently decided an important question concerning the eligibility of S. W. Fordyce, president of the "Cotton Belt" Railroad Company, to act as a receiver of a competing line—the St. Louis, Kennett and Southern Railroad.

The constitution and statutes of the state prohibit the officers of one railroad company acting as officers of another competing or parallel line. Mr. Fordyce was appointed receiver of the last-named company, and the selection was assailed because of the constitutional and statutory provisions mentioned, it being contended that he was ineligible for the position. The objection was sustained, the supreme court saying: "It is obvious that the president of a parallel or competing railroad, however high his business qualifications, is not eligible to appointment as receiver of the competing railway line."[1]

This decision is certainly reasonable and just, and would be so without the constitutional and statutory provisions cited.

The interests of all persons concerned ought to and will be considered in making the appointment. The parties will not be permitted to dictate who shall be appointed.[2]

Section 339. **Power to Manage and Operate Railways — Operation to be Speedily Ended — The English Rule.** — Previous to the enactment of the railway companies act,[3] the English courts were extremely averse to the appointment of receivers with power to operate railroad property. Thus it was said by Lord Cairns: "When parliament, acting for the public interest, authorizes the construction and maintenance of a railway, * * * it confers powers and imposes duties and responsibilities of the largest and most important kind * * * upon the company which parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. * * * It is impossible to suppose that the court of chancery can make itself, or its officer, without any parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. * * * In the view I

[1] St. Louis, Kennett and Southern Railroad Co. v. Wear, 36 S. W. R. 357.

[2] Richards v. Chesapeake and Ohio Railroad Co. 1 Hughes, 28, 32.

[3] 30 and 31 Vict. ch. 127 (1867), made perpetual; 38 and 39 Vict. ch. 31 (1875).

take of the case, the order would be improper, even if made on the express agreement and consent of the company."[1]

Section 4 of the above act referred to provides that the property of a railway constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on its railway, or of its stations or workshops, shall not be liable to be taken in execution at law or in equity, but the person who has recovered a judgment may obtain the appointment of a receiver, and, if necessary, a manager, of the undertaking of the company, on application by petition, in a summary way, to the court of chancery in England or in Ireland, and directs that the receipts, after payment of the working expenses of the railway and other proper outgoings, shall be applied by the court in payment of the company's debts according to their priority.[2]

This aversion to take control of and operate railway property, in the absence of statutory authority, was so marked that in a case where a party obtained a decree against a railway company for the specific performance of a contract to purchase certain lands for the construction of its road, and declaring a vendor's lien in his favor for the balance of the purchase money, which was unpaid, and the company had become insolvent, though the court made an order for a receiver, with direction to the company to give him immediate possession, it refused to grant an injuction to restrain it from operating its cars over and using the land, on the ground that it would render the land useless to both parties.[3] And in a similar case an application for a receiver was refused before judgment had been obtained in the action, notwithstanding the fact that the company admitted the liability.[4]

In this country, as we shall see, the appointment of receivers with power to manage and operate railroads during the pendency of the controversy is rather a rule than an exception.[5] In fact the very purpose of the appointment of a receiver is to continue the operation of the road, thus protecting and preserving the property and serving public interests.

But "it is the duty of the receiver to take only such steps as may

[1] Gardner v. London, etc. Ry. Co. L. R. 2 Ch. 201, 212.

[2] The provisions of this act are discussed in *In re* Beddgelert Ry. Co., W. N. (1871) 8; s. c. 19 W. R. 427; *In re* Manchester & M. Ry. Co. (*Ex parte* Cambrian Ry. Co.) L. R. 14 Ch. D. 645; *In re* Birmingham, etc Junction Ry. Co. L. R. 18 Ch. Div. 155; *In re* Stafford & Uttoxeter Ry. Co. W. N. (1868) 113; *In re* Southern Ry. Co. 5 L. R. (Ir.) 165.

[3] Munns v. Isle of Wight Ry. Co. L. R. 5 Ch. App. 414.

[4] Lattimer v. Aylesbury, etc. Ry. Co. L. R. 9 Ch. D. 385.

[5] Moran v. Lydecker, 27 Hun, 562.

be reasonably necessary to protect the property from destruction, waste or spoliation; and only in extraordinary cases and where there is an irresistible necessity should he continue such business for a long period of time. It is neither in the spirit nor letter of the law of this country that railroads should be operated for a long series of years by the courts through the medium of receivers, as it imposes burdens and responsibilities upon the courts which are non-judicial and is not in harmony with the true theory of American jurisprudence."[1]

Section 340. **Receivers with Power to Raise Money and Create a Lien for its Payment.**—"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested."[2]

Section 341. **Of the Appointment on Application of the Railroad Itself—The "Wabash Case."**—It appears that in the case of Wabash, St. Louis & Pacific Railway Co. v. Central Trust Company,[3] receivers were appointed for a corporation, which was a consolidation of a number of existing railway companies, created by several states, *upon its own application*, alleging its insolvency, and that if the lines of road composing it were broken up and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials and supplies scattered abroad, the result would be irreparable injury and damage to all persons having any interest in the several lines of road.

Of this judicial action Judge Treat, whose great learning, accurate judgment and untiring industry for so many years adorned the

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[1] Minneapolis & St. Louis Railway Co. v. Minneapolis & Western Railway Co. (Minn.) 63 N. W. R. 1035; Platt v. Philadelphia & Reading Railroad Co. 65 Fed. Rep. 872.

See article by Judge Caldwell upon the subject, 30 Am. L. Rev. 161.

[2] Mr. Justice Bradley in Wallace v. Loomis, 97 U. S. 146, 162. See further the chapter on Receiver's Certificates, *infra*.

[3] 22 Fed. Rep. 272.

bench of the United States courts in the eastern district of Missouri, said: "The proceeding is peculiar in this aspect, that the application was made by the corporation itself, instead of being made by the mortgagee on default of payment of interest."[1]

In the absence of any report of the original proceeding, or of the opinion delivered, if any there were, it may be safely assumed that no precedents were cited to justify the action of the court.

It is not utterly at variance with some of the elementary rules relating to receivers — as they can only be appointed in a suit pending, and for the sole purpose of preserving the property in controversy, to await the judicial determination of its ownership and disposition, etc. — but, in its most favorable aspect, it makes receivers mere assignees for the benefit of creditors. That it opens the door to gross frauds upon creditors, by enabling unscrupulous manipulators of railroad property to use the power of the United States courts to stay the hands of creditors in pursuing their lawful remedies, and to carry on the business of the road while schemers force favorable compromises, is manifest. That the discretion of a single judge, however honest and capable, may be successfully invoked, upon the application of an insolvent railroad company, to take possession of its property and operate it for an indefinite period of time, under a system which gives the court control of suits against the company even beyond its own territorial jurisdiction, and suspends the common law right to a jury trial, is startling. It is to be hoped that this decision will not become a precedent.[2]

Section 342. **A Receiver will be Appointed for a Railroad only as an Adjunct to the Enforcement of the Equitable Rights of the Parties, and Not Merely to Manage the Property at the Instance of Parties Dissatisfied with its Control.**—In a late case before the circuit court of the United States for the northern district of Ohio, brought by the trustee of a mortgage for its fore-

[1] In a later and recent case Judge Treat, referring to the action of the court in this case, defended it and said that it had received the sanction of the supreme court of the United States, but did not state when or where it was given. Central Trust Co. v. Wabash, St. Louis & Pacific Ry. Co. 29 Fed. Rep. 618, 623 (Dec. 1886).

[2] It is worthy of notice that the receivers appointed in this case were subsequently superseded by others as to the property in their hands located in Illinois, upon the application of creditors of one of the roads forming the Wabash system holding an older lien, though not on account of the manner in which they were appointed. See Atkins v. Wabash, St. L. & P. Ry. Co. 29 Fed. Rep. 161.

This section is the same as in the original edition. The author of the present edition has discussed the same subject at length in section 51, *supra*.

closure, it appeared that, although there had been default in payment of interest, the contest was, in reality, a proceeding for the control of the railroad property. In the luminous opinion in this case Hammond, J., said: "Undoubtedly there are cases where a court of equity may take hold of mortgaged property before default in the condition of the mortgage, and protect the security against impending danger from fraudulent management, but this is not one of them. It would be intolerable to extend that principle so as to transfer to a court of equity every controversy over the management of mortgaged property, or to convert those courts into the supervisors of the control of every corporation whose property is pledged to secure its mortgaged debts. * * * The very existence of a reasonable dispute as to whether the conditions of the mortgage have been broken, is sufficient to cause the court to refuse a receiver, for one ought not ordinarily to be appointed unless the right of foreclosure is clear and indisputable, and this upon the ground that one lawfully and by the contract of the parties in possession of the property, should not be disturbed in that possession except in a clear case of the right to do that. * * * Railroad mortgages are sometimes used as an instrumentality of adventurous speculation rather than a safe security for money advanced, and while the courts should use every possible endeavor to save to the utmost the value of the security, when properly called on to do so, they should not suffer themselves to become likewise an instrumentality of adventurous speculators, seeking to use the courts as weapons of offence in the warfare that goes on among themselves. Courts should be confined strictly to the domain of courts of law and equity, engaged only in the business of settling, according to the established rules of law and equity, the controversies that arise and come within the workshop of jurisprudence, but not those that lie outside and within the arena of gladiatorial struggles for business advantages and spculations. The plaintiff here does not like and perhaps is alarmed, possibly not without cause, at the conduct of their joint enterprise with the defendants, but that dislike and alarm do not furnish any solid basis of interference by a court to appoint a receiver to quiet that alarm. We cannot look to the mortgage only and shut our eyes to the other contracts and transactions between the parties, from which it appears that they were joint adventurers in an enterprise of which this mortgage contains only a part of the agreements and stipulations."[1]

[1] American Loan and Trust Co. v. Toledo, C. & S. Ry. Co. 29 Fed. Rep. 416, 420, 421 (1886).

So also when, in order to prevent adverse proceedings by the creditors of a railroad, and to utilize the income for the permanent improvement of the property by diverting it from the payment of the debts of the corporation, a receiver was appointed by collusion of the parties, the court, when it knew the facts, discharged the receiver on its own motion.[1]

Section 343. **Of the Appointment by Virtue of Statutory Authority — Failure to Operate.** —Where, as in New Jersey, a statute for the protection of the rights and convenience of the public, authorizes the chancellor to appoint a receiver for a railroad upon the petition of any citizen showing that it has failed and neglected to run daily trains on any part of its road for the space of ten days,[2] the proceedings of a receiver appointed under the authority of the act will not be stayed to allow an inquiry into the causes of the failure of the company to operate its road, since the objects to be obtained are the convenience of the general public and the relief of the citizens along the line of the road. In such a case it is obligatory upon the court to take the measures designated in the act in order to relieve the public from the effect and consequences of the dereliction of duty on the part of the owners of the road; the public necessity is paramount, and the court will release its hold only when it is satisfied of the ability and readiness of the company to operate its line.[3] And where a statute directed the comptroller-general of a state to take possession of a railway whenever there was default for six months in the payment of interest upon its debt which had been guaranteed by the state, it was held that the fact that the possession of the road had been given to a receiver by a decree of court upon the petition of creditors, was no bar to proceedings by the comptroller-general under the act, and that the exercise of his power did not impair the obligation of the contract between the state and the holders of the guaranteed bonds.[4]

Section 344. **Default in Payment of Interest Upon Securities is Not Necessarily a Ground for the Appointment of Receivers.** — Although the greater number of cases in which receivers for railroads are appointed arise from default in payment of interest upon securities, it is not necessary that default take place before

[1] Sage v. Memphis & Little Rock R. R. Co. 5 McCrary, 643.

[2] Act of N. J., approved February 12, 1874.

[3] *In re* Long Branch & Sea Shore R. R. Co. 24 N. J. Eq. (9 C. E. Green) 398.

[4] *Ex parte* Dunn, 8 S. C. 207.

they will be appointed. Thus, if a default is imminent and manifest and the corporation is in danger of being broken up, and its business is likely to be destroyed, it lies in the discretion of the court to place its affairs in the hands of a receiver whenever the welfare of the various interests involved clearly requires such action, even though no default has actually been made in its obligations to the party who has filed the bill and made the application.[1]

Section 345. **Non-Payment of Interest is Not Sufficient, if Waived by Agreement, or Unless the Right of Foreclosure Exists — Secured Creditors.** — Where an agreement was entered into having for its object the re-organization of a railroad then undergoing foreclosure, which agreement contemplated the issue of bonds secured by a new mortgage, and during the process of carrying out the agreement, the parties disagreed and engaged in a contest for the control of the board of directors, the trustee of the new mortgage filed a bill for foreclosure, alleging, among other things, default in the payment of interest coupons. On motion for the appointment of a receiver it was held that, although there had been default in the payment of the interest coupons secured by the mortgage, yet, as it appeared that there was a fair and reasonable claim by the defendant company, growing out of contemporaneous contracts, that the time of payment had been extended, and that the plaintiffs were precluded from relying on the default, a receiver should not be appointed, until the court should determine that the right of foreclosure existed; and that the mere disagreements of the parties as to the management of the property furnished no ground for the appointment of a receiver.[2]

Section 346. **Receivership Refused in a Suit to Recover Money Paid for Stock Illegally Issued.**—Where a bill was filed by the holder of the stock of a railroad corporation, which he alleged had been unlawfully issued, praying for an inquiry into its legality, and for repayment of the amount paid by him for such shares if their illegality should be established, and for an injunction against the disposal of so much property as would provide for the repayment and for the receivership, the court refused both the injunction and

[1] Brassey v. New York & N. E. R R. Co. 19 Fed. Rep. 663; s. c. 22 Blatchf. 72. In this case Shipman, J., refused a petition for the appointment of a co-receiver.

[2] American Loan and Trust Co. v. Toledo, C. & S. R. R. Co. 29 Fed. Rep. 416 (1886).

the receivership, because it appeared that the money received by the railroad company for the bonds had not been kept separate from its general funds, and could not be traced and identified.[1]

Section 347. **Where Ordinary Remedies will Suffice, Creditors will be Relegated to Them.**—The general rule that the extraordinary remedy of a receivership will not be granted where there is another clear and ample remedy open to the complaining party is specially applicable to contests involving railroad property. Applying this principle, Mr. Justice Miller, of the supreme court of the United States, said: "The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars' worth of property—of such peculiar character as railroad property is—from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court."[2]

In the same way it was held that while an action to prevent the consolidation of railroad companies was pending, the participation of certain stockholders, who had been enjoined from so doing, in the election of directors for the new consolidated company, at a meeting held in pursuance of a statute prescribing the method of their election, was no sufficient ground for the appointment of a receiver.[3]

Section 348. **Of the Effect of the Inter-State Commerce Law on Railway Receivers.**—The recent Act of Congress, approved February 4, 1887, known as the Inter-State Commerce Law, for the regulation of traffic between the several states, or between them and foreign countries, seems to contemplate receivers of railroads as per-

[1] Whelpley v. Erie Railway Co. 6 Blatchf. 271. It was also held in this case that an order for an injunction and receiver will not be made in an improper case even on consent of both parties, especially if the rights of third parties are affected. But in Brassey v. New York & N. E. R. R. Co. 19 Fed. Rep. 663, s. c. 22 Blatchf. 72, it was held that the mere concurrence of directors in an attempt to secure the appointment does not amount to fraudulent collusion, unless they design some injury to the company or its creditors.

[2] Milwaukee and Minnesota R. R. Co. v. Soutter, 2 Wall. 510, 523.

[3] Railway Co. v. Jewett, 37 Ohio St. 649.

sons in charge of the affairs of such roads, without reference to their official relation to the court appointing them. By section 9, suits upon claims for damages by a common carrier may be brought "in any district or circuit court of the United States of competent jurisdiction," and such court may compel a receiver "to attend, appear and testify in such case, and may compel the production of books and papers of such corporation or company party to the suit." Section 10 makes a receiver, among others, liable to a fine of $5,000 for any infraction of the provisions of the act. Section 16, which relates to disobedience of the lawful orders of the Inter-State Commerce Commission, authorizes "the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen," to issue a writ of injunction or other proper process, to restrain such violation or disobedience, and enjoining obedience; and in case of any disobedience of such process, to issue writs of attachment, or other proper process, against such common carrier, or against any owner, lessee, trustee, receiver or other person so failing to obey, and to make an order directing the carrier, or person so disobeying, to pay a sum of money not exceeding $500 for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction, or other proper process. These clauses, taken in connection with section 3 of the Removal of Causes Act of March 3, 1887, providing that a receiver of a United States court "may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court" which appointed him, go far towards impairing those functions of a receiver which have grown out of the principle that he is an officer of the court appointing him, subject only to its authority and discipline, by substituting for him a business manager, nominated by the court, but subject to other jurisdictions in many of his most important duties and responsibilities.

Section 349. **Effect of Appointment — Does not Dissolve the Corporation.**— That the appointment of a receiver for the property of a railroad does not have the effect of dissolving the corporation is well settled.[1] The status of a railway corporation after its affairs have been placed in the hands of a receiver is clearly defined in a recent case in Illinois as follows: "Notwithstanding the appointment of the receiver, the corporation is clothed with its fran-

[1] Sections 205 and 426.

chises, and such corporation still exists. The effect of the appointment of the receiver is simply to give him the temporary management of the railroad, under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that and nothing more. As the corporation still exists, it may still exercise, as before, its franchises, so it does not interfere with the rightful management of the road by the receiver, so far as his duties are defined by the court appointing him. No doubt it may do many corporate acts, and certainly it can do all things necessary to preserve its legal existence notwithstanding the appointment of the receiver to whom the temporary management of the road is given — otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation."[1]

In the application of this principle to a case brought upon a statutory right for damages, in which the railway company entered a special plea that before the cause of action arose its property was in the possession of a receiver appointed by a federal court by an order which enjoined and restrained the company, its officers and employes from interfering with the possession of the receiver, or with the management or operation of the road, the action of the court below in sustaining a demurrer to the special plea was affirmed on appeal.[2] A judgment of ouster against the directors of the corporation who were elected after the receiver's appointment has been refused, even after its property has been sold.[3]

When a receiver was appointed for a railroad while proceedings were pending for a *mandamus* to obtain the bonds of a certain town which had been voted as a subscription to the capital stock of the company, it was held that the proceedings were not abated by the appointment, and that the appointment did not furnish any obstacle to their prosecution so long as the receiver interposed no objection.[4]

So, too, a state has recovered judgment against a railroad company for taxes due upon the gross earnings of the road, notwithstanding the road had been placed in the hands of receivers, who were operating the road and controlling its earnings during the time for which the taxes were levied.[5] And when a state court issued an injunction restraining a railroad company from using a

[1] Ohio & Miss. R. R. Co. v. Russell, 115 Ill. 52; s. c. 3 N. E. Rep. 561 (1885). To the same effect see State v. Merchant, 37 Ohio St. 251; People v. Barnett, 91 Ill. 422; Safford v. People, 85 Ill. 558, 560.

[2] Ohio & Miss. R. R. Co. v. Russell, 115 Ill. 52.

[3] State v. Merchant, 37 Ohio St. 251.

[4] People v. Barnett, 91 Ill. 422.

[5] Philadelphia & Reading R. R. Co. v. Commonwealth, 104 Pa. St. 80.

certain street for loading and unloading cars, and receivers were afterward appointed for the company by a federal court, who violated the injunction, they were punished by the state court for their contempt, on the ground that the company was at the time of the appointment in duty bound to obey the injunction, and that the receivers were bound to observe and obey it "precisely as though they had been appointed and were acting under the directory of the company."[1]

"The appointment of the receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens."[2] Receivers of railways are not invested with the title to the property.[3] The appointment of a receiver deprives the company of all power over the operation of the road, and it is not to be held responsible for the discontinuance by the receiver of the running of trains over a part of its line.[4]

A general consideration of the question of title of receivers has been set forth in other sections.[5] The same rule applies to receivers of railways: temporary receivers of such companies do not become invested with title to the property of the corporation.[6]

The ordinance of a city requiring a street railroad company to repair a street disturbed for the purpose of constructing its tracks are not defeated by the appointment of a receiver of the company.[7] "The order appointing a receiver in itself places the assets of the insolvent corporation in the hands of the court."[8]

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[1] Safford v. People, 85 Ill. 558, 561. In this case the court also held that one receiver, who took no active part in the management of the road, though he knew of the injunction, could not escape liability by remaining inactive, but was bound to use efforts to prevent disobedience to the order of injunction on the part of the other receiver or their employes; and that the fact that the receivers had been removed from their office constituted no defence to proceedings to punish them for contempt in defying the authority of the state, acting through its properly constituted authorities. In New York the question of the dissolution of a railway corporation by the appointment of a receiver seems not to have been ruled upon by the higher courts. As to other corporations see Kincaid v. Dwinelle, 59 N. Y. 548, affirming s. c. 37 Super. Ct. (J. & S.) 326, followed in Hollingshead v. Woodward, 35 Hun, 410; Huguenot National Bank v. Studwell, 74 N. Y. 621, reversing s. c. 6 Daly, 13; Green v. Walkill National Bank, 7 Hun, 63.

[2] Kneeland v. American Loan & Trust Co. 136 U. S. 89.

[3] Abbey v. International & Great Northern Railway Company's Receivers, 5 Tex. Civ. App. 261.

[4] State *ex rel.* v. Marietta & Cincinnati Railroad Co. 35 Ohio St. 154.

[5] Sections 206 *et seq.*

[6] Abbey v. International & Great Northern Railway Company's Receivers, 5 Tex. Civ. App. 261.

[7] City of Ft. Dodge v. Minneapolis & St. Louis Railway Co. (Io.) 54 N. W. R. 243.

[8] Clinkscales v. Pendleton Manufacturing Co. 9 S. C. 318.

The appointment is subject to all valid and existing liens which attached to the property prior to the appointment.[1]

As the mere appointment of a receiver does not dissolve the corporation, it may be sued thereafter.[2]

It has been declared by the supreme court of Illinois that, as a statute requiring a railroad company to fence its right of way is a police regulation, it is not within the jurisdiction of any court, either state or federal, to arrest its operation; and that the appointment of a receiver of a railroad company does not release it from obedience to the statute. This was said by the court: "Although after the appointment of a receiver and while he is operating a railroad to the exclusion of the employes of the corporation, the corporation will not be liable for injuries caused by the negligent acts of the agents or servants of the receiver, yet the proposition has no application to the case at bar. The action is against defendant for the non-performance of a duty imposed by statute, against which it is apprehended no order of court can avail to relieve it. It is a police regulation to which the corporation is subjected by the sovereignty of the state and it is not within the rightful jurisdiction of the court, either state or federal to arrest its operation. Notwithstanding the appointment of the receiver the corporation is clothed with its franchises, and such corporation still exist. The effect of the appointment of a receiver is simply to give him the temporary management of the railroad under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that, and nothing more. * * * No doubt it may do many corporate acts, and certainly it can do all things necessary to preserve its legal existence, notwithstanding the appointment of a receiver to which the temporary management of the road is given; otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation. * * * The mere fact that its property may be temporarily in the hands of a receiver does not remove the corporation from the operation of such regulations, any more than a private citizen is released from the duty to observe the law because his property may be sequestered by the order of a court for the benefit of his creditors."[3]

Section 350. **Of the Preservation and Protection of the Property — Interference with the Operation of the Road — Strikes.** — Where the order appointing a receiver authorized him to bring suits

[1] Snow v. Winslow, 54 Io. 200.

[2] Scott v. Rainier Power & Railway Co. (Wash.) 42 Pac. R. 581.

[3] Ohio & Mississippi Railroad Co. v. Russell, 115 Ill. 52.

for acquiring, securing and protecting the assets, franchises and rights of a railway company, and for securing and protecting the land grant and land reservation of the company, it was held by the supreme court of the United States that he could maintain a bill against the officers of a state to enjoin them from granting to other persons lands which the state had granted to the company and which it had declared to be forfeited. Mr. Justice Swayne said: "The bill is auxiliary to the original suit. It is analogous to a petition by a receiver to protect his possession from disturbance or the property in his charge from threatened injury or destruction."[1]

It is well established that the court will punish, as for contempt, all interference with the operation of a line of railroad which is being managed by its receiver. So when the employes of another road had "struck" and, by intimidation and violence, prevented the employes of the receiver from working, they were tried, in a summary manner, as for a contempt committed in the actual presence of the court and duly punished by imprisonment.[2] Inducing employes, by persuasion or argument, to leave the service of a road in the possession of a receiver is not a contempt of court; but if the object is accomplished by threats or violence, or by overawing them by preconcerted demonstrations of force, the perpetrators may be punished as for a contempt.[3]

In the case of Thomas v. Cincinnati, New Orleans and Texas Pacific Railway Company,[4] the power of the federal court to punish one assisting or precipitating a strike by calling out the receiver's employes was asserted. The power was said to be conferred on the court by the following section of an act of Congress: The courts of the United States "shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment at the discretion of the courts contempt of their authority: provided, that such power to punish contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of said courts."[5] It was said that "any wilfull attempt by any one, with knowl-

[1] Davis v. Gray, 16 Wall. 203, affirming s. c. 1 Woods, 420.

[2] Secor v. Toledo, Peoria & W. R. R. Co. 7 Biss. 513; King v. Ohio & Miss. R. R. Co. 7 Biss. 529.

[3] United States v. Kane, 23 Fed. Rep. 748.

[4] 62 Fed. R. 803.

[5] Section 725 U. S. Stats.

edge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals would give a right of action for damages, is a contempt of the order of the court;" that the contemner intended to prevent the operation of the railroad by calling out the receiver's employes; that the test is whether such interference would render him liable in an action to the receiver if he were a private corporation.

Judge Hanford refused on one occasion to order the re-employment of those who voluntarily quit their work out of sympathy for strikers, because, it was said, to do so, would cause the removal of competent men who served the receiver under adversity.[1]

Section 351. **Beyond Such Action as is Necessary to Protect the Property the Court will Not Exercise its Power on Behalf of the Railroad Corporation.**— The object of the appointment of receivers being the preservation of the property for the benefit of those who are interested in it, the court has no other function to exercise than that which will assist in carrying out this object. So a petition filed by a railroad company in the suit in which receivers were appointed, asking for an order postponing the holding of a meeting of the stockholders for the election of officers, on the ground that it had been called through mistake and was not consistent with the by-laws of the corporation, was refused, the court holding that the power which it was asked to exercise was not pertinent to the purpose of the receivership.[2]

Section 352. **Of Receivers of Railways as Between State and Federal Courts.**— Under the National Bankruptcy Act the United States courts sitting in bankruptcy refused ordinarily to interfere with the possession of receivers previously appointed by state courts. This rule was applied to receivers of railroad property by Mr. Justice Blatchford, who said: "As the state courts were in possession of such railroads and other property when these proceedings in bankruptcy were commenced, and have continued in possession of the same ever since, it is not for this court to interfere with such possession, at least until the title of the receivers is impeached for some cause for which it is impeachable under the bankrupt act;

[1] Booth v. Brown, 62 Fed. R. 794. The person proceeded against for contempt was W. F. Phelan, who, with Eugene V. Debs, officers of the American Railway Union, ordered the receiver's employes to strike.

[2] Taylor v. Philadelphia & Reading R. R. Co. 7 Fed. Rep. 381.

nor is it for this court, before such title is impeached, to interfere with the management and control of such railroads and other property by such state courts, or by such receivers under the orders of such state courts;" and he so modified an injunction order issued by his own court, that the making of a contract and giving of securities authorized by a decree of the state court should not be deemed or taken as a violation or contempt of the injunction.[1] On the other hand it has been held that when a railroad company is in the possession of a receiver appointed by a United States court, a telegraph company cannot acquire title to its right of way by proceedings for condemnation in a state court without leave from the federal court.[2]

A federal court has refused to take jurisdiction of a bill to call on a receiver, in possession of railroad property under the order of a state court, to render an account and collect the assets under its direction, requiring the party so applying to pursue his remedy before the state court which appointed and should control its receiver.[3] And as between courts of the same state, it has been held that one court will not attempt, by a writ of *mandamus*, to direct the receivers appointed by another court of competent jurisdiction as to the management of their trust.[4]

Section 353. **Of Enforcing the Right to an Easement.**— Where two or more railroads possess a community of interest in property, as where they are tenants in common of a right of way through a tunnel, a court of equity will protect one of them against the injustice of the others, for otherwise the party whose rights are invaded would be without adequate remedy. This is especially so because railroads, although technically private corporations, are in some measure public agents. But in such case the court will not readily place the tunnel itself in the hands of a receiver if it can administer justice between the parties by means of an injunction or some other sufficient remedy.[5]

Section 354. **Of Specific Performance and the Rescission of Contracts.**— Where, by contract, an express company made a loan to a railroad company in return for certain privileges and facilities

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[1] Alden v. Boston, H. & E. R. R. Co. 5 Nat. Bank Reg. 230.

[2] Western Union Telegraph Co. v. Atlantic & Pacific Telegraph Co. 7 Biss. 367.

[3] Conkling v. Butler, 4 Biss. 22.

[4] State *ex rel.* v. Marietta & Cincinnati R. R. Co. 35 Ohio St. 154.

See as to conflict between state and federal courts, sec. 25.

[5] Delaware, Lackawanna & Western R. R. Co. v. Erie Ry. Co. 21 N. J. Eq. (6 C. E. Green) 298, 311.

in carrying on its business over the road, and agreed that the sums due therefor, upon monthly settlements, should be applied by the railroad company in payment of the loan, the road being afterwards put in the hands of a receiver who declined to carry out the contract, it was held, in a suit by the express company against him to enforce specific performance, that the transaction between the companies was not a license, but simply a contract for transportation creating no lien, the specific performance whereof would be a form of satisfaction or payment, which the receiver cannot be required to make.[1] When a railroad company had, by contract, the right to run over the defendant's road, upon accounting to the defendant company by the 15th of each month for the month preceding, and paying the ascertained balance due defendants within ten days thereafter, and was three months in arrear, it was held that the receiver of the defendant road had a right to sever the connection between the roads.[2]

Section 355. **Of Distraint Upon Railroad Property in the Hands of a Receiver.**— In an English case, where lands were conveyed to a railway company by various persons in consideration of rent charges, suit being instituted by the owner of one of the rent charges, on behalf of himself and all the other owners of rent charges who should come in and contribute to the expenses of the suit, a receiver was appointed of the tolls, profits and income of the road. Subsequently, in a suit by the owner of another rent charge, the court granted leave to distrain upon the land notwithstanding the receiver's possession, Lord Romilly, M. R., saying: "The receiver was not appointed for the purpose of keeping persons out of their rights, and in making this order I express no opinion as to the legal rights of the applicant, but simply remove out of his way the difficulty of the officer of the court being in possession."[3] But, in the same controversy, after the railway company had, by deed, conveyed their superfluous land and chattels in trust for the benefit of creditors, the court refused to allow distraint either upon the property so conveyed or upon the locomotives used in the operation of the road.[4]

Section 356. **Of the Duties of the Receiver in Foreclosure Proceedings — Subrogation.**— The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the

[1] Southern Express Co. v. Western N. C. R. R. Co. 99 U. S. 191.

[2] Elmira Iron & Steel R. M. Co. v. Erie Ry. Co. 26 N. J. Eq. 284.

[3] Eyton v. Denbigh R. & C. Ry. Co. L. R. 6 Eq. 14.

[4] S. C. Ibid, 488.

rents and preserving the property from loss and decay. In railway foreclosures, his duties, though more extensive, are primarily the same; the appointment is presumed to be for the benefit of the mortgagees and for the protection of their interests. So where a railroad company, before becoming insolvent, purchased a large number of locomotives and other rolling stock, to be paid for by monthly installments, the title to which property was to remain in the vendors until the whole amount of the purchase money should be paid, and the directors and others, in order to preserve the property for the benefit of the company and its creditors, advanced, on account of such rolling stock to the owners thereof, a large sum, with the understanding that they should, upon the payment of the balance, become owners of it and hold the same for the benefit of the company until their advancement was repaid to them by the company, it was held, upon their petition to be subrogated to the rights of the vendors to the extent of their advancement and for the payment of such amount by the receiver, that the right of subrogation could not be enforced until the whole debt was paid; that the money which came into the receiver's hands in the management of the road constituted the only fund out of which the monthly payments to the owners of the rolling stock were to be made, and that the petitioners' claims should not be made a lien upon the rolling stock prior to the lien of the vendors.[1]

Section 357. **The Court will Refuse a Remedy to a Receiver Upon a Claim Founded Upon His Fraudulent Conduct.**—Where a receiver joined other parties in purchasing bonds, secured by a mortgage which was being foreclosed in the suit in which he was acting as receiver, which bonds were to be used in purchasing the railroad at the foreclosure sale, and fraudulently imparted information known only to him, besides assisting in negotiations for the purchase, and the road was bought by the other parties in their own name, though the receiver was interested with them, the court, applying the rule that a court of equity will not aid in the perpetration or consummation of a fraud, nor give assistance whereby any party connected with a betrayal of trust can derive any benefit therefrom, dismissed his bill to recover his share of the profits of the transaction and to compel an accounting by his confederates.[2]

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[1] Receivers of N. J. Midland R. R. Co. v. Wortendyke, 27 N. J. Eq. 658, 662.

[2] Farley v. St. Paul, Minneapolis & Manitoba R. R. Co. 4 McCrary, 138.

Section 358. **An Order by Consent Vacating an Appointment Should Not Make Reservations.**—Where, upon the motion of defendant, consented to by the plaintiff, to vacate an order of appointment, an order was entered partly granting and partly refusing it, by requiring the receiver to restore the railroad its appurtenances and management to the company, but also requiring him to continue to receive and disburse its earnings and incomes, the appellate court reversed and set aside the order on the ground that, as the motion was concurred in by all the parties in interest, the order should manifestly have included the receipt and disbursement of its future earnings.[1]

Section 359. **The Receiver Must be Discharged Upon Payment by the Defendant of the Amount Found to be Due.**—In a case where the complainants sought to foreclose a mortgage, with a view to make their debt, and the owner of the equity of redemption came forward, and offered to pay the debt, or all of it that was due, provided his property, which was in the custody of the court, should then be restored to his possession, and the court below refused to make an order of restoration, it was said by Justice Miller, of the supreme court of the United States, on the appeal: "While the parties to this suit were fiercely litigating the amount of the mortgage debt and questions of fraud in the origin of that debt, the appointment, or the discharge, of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the circuit court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim, and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error — judicial error — which this court is bound to correct when the matter, as in this instance, is fairly before it."[2]

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[1] L'Engle v. Florida Central R. R. Co. 14 Fla. 266.

[2] Milwaukee & Minnesota R. R. Co. v. Soutter, 2 Wall. 510, 521.

II.

THE RECEIVERSHIP IN FORECLOSURE PROCEEDINGS.[1]

Section 360. **Appointments are Subject to the General Rules Obtaining in Other Cases—Cause for Appointment.**—We have already seen that failure to pay interest upon indebtedness is not essential to the success of an application for a receiver of a railroad, and that it is not sufficient of itself for that purpose unless the right of foreclosure exists.[2] It is, nevertheless, true that by far the greater number of foreclosures of railway securities and the appointment of receivers pending the proceedings in them, are in cases where the claims of the parties applying are based on non-payment of interest, coupled with insolvency. It is well to bear in mind that, except for the magnitude of the monetary interests involved, the number of persons interested as holders of securities, the peculiar nature of railroad property, and frequently its location in more than one jurisdiction, the foreclosure of mortgage liens upon railways differs in no material respect from the same proceedings upon other and less important mortgages, and that the same general rules apply in both cases. So when the railroad property covered by a mortgage was plainly inadequate for securing the indebtedness for which it was mortgaged, and it was proved that the railroad corporation was insolvent, the court considered it a proper case for the appointment of a receiver, saying that "inadequacy of security in connection with insolvency is good ground for the interposition of a court; or where there is reason to believe that the complainant will not be in as good a position at the final decree as at present."[3]

In an action brought by the trustee of a mortgage of a railroad

[1] See chapter 16 upon Receivers of Mortgaged Property.

[2] Secs. 344, 345, *supra*. See also Williamson v. New Albany, etc., R. R. Co. 1 Biss. 198, and Tyson v. Wabash, etc., Ry. Co., 8 Biss. 247.

[3] Nelson, J., in Ruggles v. Southern Minn. R. R. Co. 17 Int. Rev. Rec. 29. To the same effect see Keep v. Michigan, etc., R. R. Co. (U. S. Circ. Ct. W. D. Mich 1873) 6 Chicago Legal News 101, where, in addition to inadequacy of security and insolvency of the road owing to the debt making it irresponsible for any deficiency upon the sale of the mortgaged property, it was shown that the corporation neglected to apply the net earnings of the road to the payment of accrued interest. Pullan v. Cincinnati, etc., R. R. Co. 4 Biss. 35. In Illinois an order at chambers appointing a receiver of a railroad is not authorized, Hammock v. Loan & Trust Co. 105 U. S. 77, but the appointment must be deemed to have been made by the court itself from and after the entry of the order at the next term of the court confirming what has been done at chambers. Hervey v. Illinois Midland R. R. Co. 28 Fed. Rep. 169, 172.

corporation, which had been declared bankrupt, having interest accumulated on its bonds exceeding the value of the property mortgaged, the purchasers of the equity of redemption at the assignee's sale being in possession of the road, receiving its income and using the property for their exclusive benefit, it was held that a clear case was presented for the appointment of a receiver, and that such appointment was not to be an interference with the corporate power and authority over the road or a disturbance of corporate possession, but merely of the possession of the purchasers from the assignee.[1]

The court will exercise its discretion in appointing or refusing to appoint a receiver for a railroad if it be apparent that, by taking possession through its officer, greater injury will be imposed upon the parties interested than would result if it refrained from disturbing the possession.[2] When by the laws of the state a sale cannot be made until after a certain time has elapsed from the date of the decree, a receiver may be appointed after the decree of foreclosure is entered.[3]

Section 361. **Of the Jurisdiction of State and Federal Courts.**— Having already noticed, in a general way, the question of conflict of jurisdiction between state and federal courts in the matter of appointing receivers, it need only be suggested here that the same principles apply to receivers appointed in proceedings for the foreclosure of railway mortgages, and that the general rule is that the court in which the first suit was commenced will acquire and retain jurisdiction until the end of the litigation, and that its possession and control of railroad property is exclusive of the interference of other courts.[4]

The practice, however, in these cases is, as we have seen, not of right, but is founded upon the comity prevailing among the courts of different political jurisdictions,[5] and there is no sufficient reason why receivers appointed by a federal court in one state may not be removed for good cause by a similar court in another state as to all the property within the jurisdiction of the court which causes the removal, especially if the application is made in a proceeding to foreclose a mortgage which is a prior lien to the one being foreclosed

[1] Kelly v. Alabama, etc., R. R. Co. 58 Ala. 489.

[2] Tyson v. Wabash, etc., Ry. Co. 8 Biss. 247.

[3] Benedict v. St. Joseph, etc., R. R. Co. 19 Fed. Rep. 173, the suit being brought in behalf of bondholders secured upon the net income of the road.

[4] Sections 20 and 21 and cases cited.

[5] Section 21.

in the suit in which the receivers were appointed, and notwithstanding that their appointment had been confirmed in ancillary proceedings.[1] A statute prescribing proceedings to enable the owners of animals killed on a railroad to hold lessees, assignees, receivers, etc., jointly liable with the corporation in damages, was held not to give state courts jurisdiction over the property of railroad corporations, placed in charge of a receiver appointed by a federal court, but it was intimated that such a suit might be maintained against a receiver appointed by the state court.[2]

Inasmuch as in New Jersey a verdict before entry of judgment thereon in the state court creates no lien on real estate, if a receiver for a railroad corporation, against which such a verdict has been obtained, has been appointed before such entry by the United States circuit court for the district of New Jersey, in a proceeding ancillary to a suit in the United States circuit court of Pennsylvania, the receiver will not be ordered by the court in New Jersey to pay the judgment; but the plaintiff must make application for an order for payment to the court in Pennsylvania.[3]

Section 362. **When Mortgage Provides for Receiver.**—It is of common occurrence that clauses are inserted in mortgages and deeds of trust and upon railways whereby the mortgagees or trustees for their benefit may, in case of default, take possession of the property and operate the railway, receiving and applying the income therefrom to the payment of their liens. Where such clauses provide a complete remedy at law and no effort is made to obtain possession, and especially when it is not shown that the security is inadequate, courts will refuse to appoint a receiver.[4] But when trustees, or others authorized by the mortgage to take possession of the mortgaged property, refuse or neglect to do so after the happening of the contingent event, and the holders of bonds secured by the mortgage themselves seek to enforce their rights by a bill in equity, a case is presented which does not depend upon the inadequacy of the security, and a receiver may be appointed.[5] The same action may be taken by the court if the proceeding be not for the

[1] Atkins v. Wabash, St. L. & P. Ry. Co. 29 Fed. Rep. 161.

[2] Ohio, etc. R. R. Co. v. Fitch, 20 Ind. 498.

[3] Jennings v. Philadelphia & Reading R. R. Co. 23 Fed. Rep. 569, 571.

[4] Rice v. St Paul & Pacific R. R. Co. 24 Minn. 464; Williamson v. New Albany, etc. R. R. Co. 1 Biss. 198; Union Trust Co. v. St. Louis, I. M. & S. R. R. Co. 4 Dill. 114. See, however, Allen v. Dallas & W. R. R. Co. 3 Woods, 316.

[5] Wilmer v. Atlanta & Richmond Air Line R. R. Co. 2 Woods, 409.

foreclosure of the mortgage, but to obtain possession after default by virtue of a clause in the mortgage, it being shown that the property mortgaged is insufficient and that the debtor railway corporation is insolvent.[1] On the other hand it has been held that it is not necessary to show that the security of a railway mortgage is inadequate if the mortgage authorized the trustees to take possession after default, such default being considered sufficient ground to justify the appointment of a receiver; but in this case additional grounds for the relief were shown, one being that the charter and a certain grant of land were in danger of being lost on account of the non-completion of the road within the time limited by law.[2]

Section 363. **The Validity of Bonds Secured by Mortgage will Not be Determined on the Hearing of the Application.**—Inasmuch as in an action for the foreclosure of a mortgage executed by a railroad company to secure bonds, the court will not, when hearing an application for a receiver, pass upon or entertain questions affecting the validity of the bonds so secured, but will reserve them for the final hearing, it can not be successfully objected, especially by testimony of a merely negative character, that the proceedings of the corporation in issuing the bonds and executing the mortgage were irregular; so, where an affidavit of an officer of the company was offered, in which he stated that he was unable to find from the record that the stockholders had given any authority to the directors or other officers to make the mortgage, such affidavit was held to be no defence to the application for the appointment of a receiver.[3]

Section 364. **Of Appointments to Prevent the Lapse of a Grant of Land.**—In a case in which a railroad company had been granted a large quantity of valuable land upon condition that its road should be completed within a certain time, and the bondholders, who were secured upon the property of the company of which the land so granted formed the principal part of the security, made application for the appointment of a receiver, showing that there was great danger of the grant being lost by reason of the road not being

[1] Dow v. Memphis & L. R. R. R. Co. 20 Fed. Rep. 260; Sacramento & P. R. R. Co. v. Superior Court, 55 Cal. 453, in which case a surviving trustee brought the suit to enforce the trust and to obtain possession of the mortgaged property.

[2] Allen v. Dallas & W. R. R. Co. 3 Woods, 316.

[3] Keep v. Michigan, etc., R. R. Co. (U. S. Circ. Ct. W. Dist. of Mich. 1873), 6 Chicago Legal News, 101.

completed within the specified time, the court granted the application and authorized the receiver to borrow sufficient money upon his obligations issued as a lien upon the road, in order to complete the line within the time named in the grant and thus preserve the security.[1]

Section 365. **Preferences Among Mortgagees Having Equal Rights are not Permitted.**—When a railroad executes mortgages upon its property which are of equal rank and not entitled to preference or priority, the courts will not allow a preference in favor of one of such mortagees over the other. So when, under one mortgage an accounting was asked for and a receiver appointed, the court refused to permit another mortgagee who had obtained a judgment to issue an execution against the property of the company unless he should do so as trustee for all the other mortgage creditors of the company as well as for himself, and pursuing the same principle the court directed an inquiry whether it was in the interest of such mortgage creditors that steps should be taken to make the judgment available to them.[2] So, also, when an act of parliament provided that there should be no preference among the mortgagees of the tolls of a turnpike, and one of the mortgagees took possession of the turnpike and applied all of the tolls in payment of his own claim, thus violating the statute, the court, upon the application of the other mortgagee, granted an injunction and appointed a receiver of the tolls in the interest of all the parties in interest.[3]

Section 366. **Of a Receiver of a Road Chartered by and Running Through Different States—Consolidated Roads.**— Where, for the purpose of securing the payment of an annuity due to a state from a railroad company which was chartered by that state and another, the company mortgaged its entire line, which lay in both of the states, the mortgage being a second incumbrance, it was held, upon proof that the earnings and revenues of the road were being used to pay junior liens instead of being applied in liquidation of the mortgage to the state, that the case was a proper one for the appointment of a receiver; and the court did not hesitate in its action because its authority did not extend over the whole road, but exercised it to the extent of its territorial jurisdiction, treating and deal-

[1] Kennedy v. St. Paul & Pacific R. R. Co. 2 Dill. 448. The report contains the order made in the case. See also s. c. 5 Dill. 519.

[2] Bowen v. Brecon Ry. Co. (*Ex parte* Howell) L. R. 8 Eq. 541.

[3] Dumville v. Ashbrooke, 3 Russ. Ch. 99 n. (*c*).

ing with such portion of the mortgaged property and franchises as were situated within the state where the suit was brought, as if the corporation were one created by the state alone.[1]

But where adjoining states chartered roads within their respective limits, which connected and became practically one line, and afterward, by authority of both states, they were consolidated and became one corporation, and as such mortgaged the line throughout its entire length, it was held by a federal court that a receiver could be appointed to take charge of the whole property so mortgaged, and that such relief could be given in an action by the bondholders wherein they sought to enforce the trust, and to foreclose the mortgage, it being shown that the trustees had refused to take possession of and to operate the road, as authorized by the terms of the mortgage, and that too although requested to exercise their power in this respect by the bondholders.[2]

Section 367. **Proceedings at Law by Bondholders are not Necessary Before a Receiver will be Appointed.**—When bonds are an equitable charge upon tolls of a railroad, and the holders cannot enforce their demand by a proceeding at law on account of the great inconvenience involved, a receiver may be appointed over the tolls and the business of the road. In such case the bondholders will not be required first to recover a judgment at law and issue execution, if the right to be paid out of the tolls is conferred by the bonds themselves; and if a receiver is already in possession the payment of the claims of such bondholders will be extended to him.[3] But where a receiver is in possession of a railway upon the application of a judgment creditor, whose judgment is a lien upon the estate or interest which the railway corporation has in lands, the judgment creditor has no prior right to moneys which come into the hands of the receiver, if there be interest due from the company upon mortgages which are of older date than the judgment.[4]

So, also, when an act of parliament authorized the trustees of a turnpike company to mortgage its tolls, a receiver was appointed on the application of the mortgagee, notwithstanding there were other mortgages upon the property, and such receiver was not required to proceed at law to obtain possession under the mortgage.[5] Lord Jus-

[1] State of Maryland v. Northern Central R. R Co. 18 Md. 193.

[2] Wilmer v. Atlanta & Richmond Air Line R. R. Co. 2 Woods, 409. *Cf.* Graham v. Boston, Hartford & Erie R. R. Co. 118 U. S. 161.

[3] Imperial Mercantile Credit Association v. Newry, etc. Ry. Co. Ir. Rep. 2 Eq. 1.

[4] Holland v. Cork, etc. Ry. Co. Ir. Rep. 2 Eq. 417.

[5] Crewe v. Edleston, 1 DeG. & J. 93.

tice Turner, in this case, in a well-considered opinion, said: "It is to be observed, too, that the rights under a mortgage of this description differ materially from the rights under an ordinary mortgage of land. Under an ordinary mortgage the mortgagee, when he enters into possession, holds for his own benefit. Under a mortgage of this description he becomes, when he enters into possession, liable to the other mortgages, to the extent of their interests. This liability, I apprehend, would entitle him, immediately upon possession taken, to come to this court to have it ascertained what is due upon the other mortgages, and for a receiver to aid him in the due application of the tolls, and if this court can be called upon to appoint a receiver immediately after the possession recovered at law, it can hardly be necessary that the proceedings at law should first be taken."

Section 368. **English Rulings as to the Appointment of Receivers in Railway Cases.** — Where a common carrier, incorporated by an act of the parliament of England, was authorized to raise money upon the security of its tolls, and exercised the power granted to it for the purpose of carrying on its undertaking, the court of chancery held that a receiver might be appointed in aid of the mortgagee in an action founded upon the failure to pay the principal debt when it matured.[1] The same court has also held that all appropriate and necessary remedies to secure payment are necessarily incident to the power of mortgaging tolls and rents of corporations, so that, although the act of parliament which grants the power, does not in express terms confer the right to have a receiver appointed in the particular case, that right will be inferred as being of necessity incident to the power to mortgage.[2] That the court cannot prescribe everything that is necessary to be done for the proper management of the corporate affairs constitutes no valid objection to the appointment of a receiver for the tolls and other property of a railway.[3]

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[1] Hopkins v. Worcester, etc. Proprietors, L. R. 6 Eq. 437. In this case the receiver appointed was ordered, after paying the costs of the proceeding, to keep down the interest on the mortgages and pay the balance into court.

[2] De Winton v. Mayor of Brecon, 26 Beav. 533; s. c. 28 Beav. 200.

[3] Fripp v. Chard Ry. Co. 11 Hare, 241; s. c. 22 L. J. (N. S.) Ch. 1084; s. c. 17 Jur. 887. In this case it was also held that the relief may be allowed in such a case, even though, by the act of incorporation, special provision is made for the appointment of a receiver on application to justices of the peace, the act providing that this special remedy shall be without prejudice to any remedies, either at law or in equity, which the mortgagee may have; and that it constitutes no sufficient objection to

Section 369. **The Rights of a Railway Receiver as to His Possession and Power to Lease Other Lines.**—So far as applications for receivers made in suits to foreclose mortgages upon railroads are made in order to obtain possession of the property covered by the mortgage, they may be considered as proceedings *in rem.* Inasmuch as the right of a receiver, appointed in such a proceeding, to the property of the corporation cannot be greater than that of the bondholders secured by the mortgage, and is, in fact, their right, he can only obtain possession of the property which was specifically mortgaged and is the object of the proceeding.[1]

When the court has exercised its authority by appointing a receiver, and has taken possession of railroad property by its officer, all requisite powers which may prove to be necessary to protect and to preserve it, pending the litigation, for the benefit of those who may be found to be entitled to it, may be exerted by the court, provided they do not exceed the powers of the corporation itself. So in a case where it was shown that such power was necessary and for the best interests of creditors, a receiver was authorized to lease other railway lines and to operate them as a part of the road already in his hands.[2]

Section 370. **Officers in Charge Under an Order of Court Held to be Receivers — Innocent Purchasers from Them will be Protected.**— Where, in an action to foreclose a mortgage, the president and directors of a railroad company were ordered to continue in the possession and management of its property of all kinds, under the order of and subject to the court, and such officers were in like manner to conduct and carry on the business of the company, and to make report to the court, when required, of the condition of the property of the company and of its earnings and expenditures, to the end that such orders might be moved for as were necessary for the protection of the property of the company, and the interests of all parties concerned, it was held that this order constituted the president and directors, and their successors receivers of the court, and that they continued the management of the road as officers of the court and not of the company.[3] In the same case it was afterwards held that one who purchased from the president and direc-

granting the relief sought that the mortgagee has not joined as defendants other mortgagees secured by the same mortgage.

[1] Noyes v. Rich, 52 Me. 115.

[2] Gilbert v. Washington City, Virginia Midland, etc. R. R. Co. 83 Gratt. 586.

[3] *In re* Fifty-four First Mortgage Bonds, 15 S. C. 304; *Ex parte* Brown, 15 S. C. 518.

tors, on new and ample consideration, certain bonds which were a part of the assets of the railroad company, without knowledge or notice of the official character of such officers as receivers, or of the trust imposed upon them, was not liable to the creditors of the corporation for the value of the bonds.[1]

III.

GENERALLY OF THE RECEIVERS OF RAILWAYS — OF THEIR RIGHTS, DUTIES AND LIABILITIES.

Section 371. **The Functions of Railway Receivers are the Same as in Other Cases, Except as Fixed by the Order of the Appointment.**— Having already treated of the rights, powers, duties and liabilities of receivers in general, there remains for notice here only such functions as apply specially to receivers in possession of railways. As in other cases, they are to be guided by the terms of the orders by which they are appointed, which may vary somewhat in particular cases, but which usually contemplate the operation and management of the road for the benefit of its creditors. In this respect the orders of appointment in railway cases differ most widely from those granted in other cases. The power and duty to manage and operate involves the necessity of contracting and paying current expenses, of assuming the responsibilities of common carriers for hire as they relate both to passengers and freight, and of other liabilities which attach themselves to railroads as they are ordinarily managed by the corporations which own them. So it has been repeatedly held that in the operation and management of railroads by receivers in chancery, they sustain to persons dealing with them the character of common carriers; and though they may at all times invoke the aid of the court of chancery in any matter affecting their duty or liability under the receivership, yet, waiving this, they are amenable in the common law courts to actions for negligence as carriers,[2] but in their official capacity.

Section 372. **Of the Parties to the Proceeding — Bondholders and Stockholders.**—The trustee named in the mortgage is the representative of all the bondholders.[3] There is no necessity for the proceedings to be protracted by giving leave to individual bond-

[1] *Ex parte* Williams, 18 S. C. 299.

[2] Newell v. Smith, 49 Vt. 255, 264.

[3] Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad Co. 53 Fed. R. 182.

holders or stockholders to file answers or cross-bills. We accept and adopt the views of Judge Caldwell, circuit judge, eighth federal judicial circuit, upon this topic, expressed in an address to the Greenleaf Law Club, St. Louis, February 20th, 1896.[1] He said: "The suit is sometimes protracted by the courts admitting into the suit as defendants individual bondholders with leave to file answers and cross-bills. The trustee in the mortgage is the representative of all the bondholders.[2] The cases must be very rare indeed where the trustee is not capable of representing all the bondholders, or where any one or more of the bondholders has any special rights or equities to be protected different from those of the other bondholders. In most cases where individual bondholders seek to be made parties they do so, not for the purpose of asserting or maintaining any right which their trustee would not or could not assert and maintain for them, but for the purpose of gaining some advantage over the majority of their fellow bondholders represented by the trustee. A single bondholder admitted as a party to the suit may file all manner of pleadings and make all manner of captious objections, and has the right to insist upon being heard on every motion and at every step in the case. If fifty different bondholders are admitted, then the fifty have all these rights and also the right to appeal. It is in vain that the great majority of bondholders agree upon a scheme of reorganization which places every bondholder on an exact equality. From their vantage ground as parties to the suit, the individual bondholders reject any and every scheme of reorganization which does not give them greater rights and privileges than are enjoyed by their fellow bondholders, and by threats of protracting the litigation, and of resisting a decree of foreclosure, and of appealing from the decree, they compel their fellow bondholders to give them that to which they are neither legally nor equitably entitled. The sound rule is not to admit individual bondholders to become parties. Even where the trustee is impeached or disqualified, the individual bondholder should not be admitted as a party, but the court should appoint or cause to be appointed or elected in the mode provided in the trust deed, a capable and impartial trustee in the place of the trustee impeached or disqualified. In thirty years' experience on the bench I have had a good deal to do with railroad foreclosure suits, and I have never in a single instance admitted an individual bondholder to become a party to the suit; and I am confident no bondholder ever lost any

[1] Published in 30 Am. L. Rev. 161.

[2] Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad Co. 53 Fed. R. 182.

right to which he was legally and equitably entitled by having his application to be made a party denied. The contrary practice is vicious and will have to be abandoned if railroad foreclosure suits are to be conducted in an orderly manner and with a due regard to the rights of all parties in interest, and are to be brought to an end within any reasonable time.

"What is here said about individual bondholders making themselves parties to the foreclosure suit applies as well to individual stockholders of the railroad company. Neither should be permitted to intervene in the foreclosure suit except under circumstances and conditions that rarely, if ever, occur. If they have any real grievance, they should seek redress by an independent suit. The doctrine of *lis pendens* will sufficiently protect their rights." [1]

Section 373. **Generally of the Rights, Powers and Duties of Receivers in Operating Railways—Capacity of Such Receivers.**—A receiver is the officer of the court appointing him, and in such capacity represents all parties interested in the property. But he is not the representative of any of the parties in the sense that they are responsible for his acts,[2] unless the appointment is secured by collusion.[3]

"His instructions are always general in their character. He is expected to look after the details of the business, and to apply to the court from time to time when special instructions seem necessary. The very nature of his relations to the court, and his duties to the creditors, entitle him to the largest degree of discretion possible in the discharge of his duties." [4]

"The receiver is the mere officer or instrument of the court in the preservation and operation of the property, and any acts of his not within the scope of the authority conferred by the order appointing him, and not otherwise authorized by the court, do not bind the court." [5]

Concerning the right of a railway receiver to deny bondholders, stockholders or creditors an inspection of his books, this has been said: "The receiver is an officer of the court, and the books, con-

[1] Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad Co. 53 Fed. R. 182; Central Trust Co. v. Marietta & N. G. Railroad Co. 48 Fed. R. 14.

[2] Dow v. Memphis & Little Rock Railroad Co. 20 Fed. R. 260; Ames v. Union Pacific Railway Co. 60 Fed. R. 966.

[3] San Antonio & Aransas Pass Railway Co. v. Adams (Tex. Civ. App.), 32 S. W. R. 733.

[4] Continental Trust Co. v. Toledo, St. Louis & Kansas City Railroad Co. 59 Fed. R. 514.

[5] Farmers' Loan & Trust Co. v. Chicago & Alton Railway Co. 42 Fed. R 6.

tracts and accounts relating to his connection with the road are *in custodia legis*, in the custody of the law and, therefore, in the court to all intents and purposes. * * * What he does should be done openly, unless the interests of the estate with which he is invested demand privacy; a circumstance which must rarely occur." Bondholders, stockholders and creditors "are entitled to an inspection of his books, papers and accounts relating to his receivership, and it should be allowed on all reasonable application made for the purpose. This privilege arises from his position as an officer of the court and the necessary publicity of all legal records. He should, however, neither be harassed nor burdened by such applications, and when oppressed by either of these incidents would doubtless be justified in seeking protection by refusing to grant the unreasonable importunity, and leave the applicant to his relief by petition. He should not be subjected, either, at any time, to purely inquisitive or fishing expeditions, either in single file or by multitude of bondholders or stockholders, or creditors congregated."[1]

Concerning the power of railway receivers the supreme court of California has said: "The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands; it has been held that in a proper case he may settle disputed claims, and compromise with debtors of the corporation; he may lease other lines of railway and operate them; he may compel the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may charge the rates agreed upon prior to his appointment between the company he represents and another railroad."[2]

Receivers appointed under statutory provisions have no power to lease the road, as it is not given by the statute; the statute restricting the receiver's powers to collecting and receiving the rents, profits and dividends of the road.[3] In receivership proceedings under statutory provisions the power of the court and receiver cannot be extended beyond those expressly or impliedly conferred by the legislature.[4] Express power to sell the railroad property and distribute the proceeds among the creditors was held to impliedly

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[1] Fowler's Petition, 9 Abb. N. C. 268.

[2] Pacific Railway Co. v. Wade, 91 Cal. 449.

[3] State of Tennessee v. McMinnville & Manchester Railroad Co. 6 Lea. 369. As to the powers of statutory receivers see section 264.

[4] Vanderbilt v. Central Railroad of New Jersey, 43 N. J. E. 669.

authorize the management and preservation of the road so as to realize the greatest possible amount for it.[1]

A receiver of an insolvent railroad has no power incident to his general authority as receiver to create a lien on the property of the railroad company for the purchase of rolling stock.[2] But a receiver may, without the previous order of the court, incur expenses necessary for the preservation of the property, which will be a valid charge against the funds in his possession.[3]

A receiver of a railway company has no right to grant to another railway company the privilege of crossing the insolvent company's tracks, especially at a different grade. The receiver should apply for leave to agree upon a crossing, or for an application by the railroad desiring to cross for the determination of the question through commissioners.[4] An arrangement between a receiver and a railroad company for the transportation for freight and passengers of the latter over the receiver's road may be terminated at any time by the receiver, when there is no provision as to a specified time.[5]

Where a receiver was appointed by a governor under statute, it was said he had no authority to lease the railroad property so as to vest in the lessee an interest that could not be divested by subsequent legislation.[6]

It has been said that "it is the duty of the receivers to adhere to and comply with charters and grants to the company by which its franchises and privileges were obtained."[7] The receivers of the Texas and Pacific Railroad Company were ordered to withdraw from all connection with the Texas Traffic Association, unless they were able to report that, under the rules of said association they would not be required to discriminate in any matter for or against any connecting or intersecting line of railway, or for or against any shipper or the public.

Where the common council of Brooklyn offered to extend and grant new rights to the receivers of the Brooklyn Elevated Railway Company it was held that the receivers could not accept the offer, it being said that receivers *pendente lite*, such as they were, have no

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[1] Vanderbilt v. Central Railroad of New Jersey, 48 N. J. E. 669.

[2] Villas v. Page, 106 N. Y. 439.

[3] Id.

[4] Howlett v. New York, West Shore & Buffalo Railroad Co. 14 Abb. N. C. 328.

[5] Investment Company of Philadelphia v. Ohio & N. Western Railroad Co. 41 Fed. R. 378.

[6] McMinnville & Manchester Railroad Co. v. Huggins, 3 Baxter, 177.

[7] Missouri Pacific Railway Co. v. Texas and Pacific Railroad Co. 28 Am. & Eng. R. R. Cas. 1.

powers which have not been conferred upon them by the order appointing them.[1]

"What expense a receiver may properly incur becomes a question sometimes of great doubt and difficulty. The fundamental idea is that he must preserve the property and hold the same to be disposed of under the orders of the court." A receiver of a railroad company may operate it and pay the expenses incident thereto; may provide additional accommodations and rolling stock; may issue certificates of indebtedness for rolling stock and the court may authorize him to borrow money to complete an inconsiderable portion of the road. He will be empowered to extend the line of the road only where by reason of some peculiar exigency, it is necessary in order to protect the rights of the parties in interest. "If a court makes an order for an extension, with all the parties in interest before it, such order probably should be regarded as valid until reversed upon appeal. We are inclined to think that the subject matter would not be beyond the jurisdiction of the court, so that its action could be treated as void in a collateral proceeding."[2]

"A receiver is not authorized without previous direction of the court, to incur any expense on account of the property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment."[3]

The receivers of one railroad company cannot, it has been said, file a petition in the suit in which they were appointed against another railway company seeking to prevent unjust discrimination in freight rates. It was held that the court could control the administration of the railroad in the hands of its receivers and restrain, by injunction, any act of any person or corporation, whether a party to the suit or not, which would interfere with the possession or control by the receivers of any of the property of the road; but the petition of the receivers was of different character, and did not charge active or constructive interference with the property; that the discriminating company could not be made a party to the proceeding, but must be proceeded against in an independent action.[4]

An order of court is not necessary to authorize the receivers to make contracts for freight rates; and they may contract to carry

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[1] Negus v. City of Brooklyn, 62 How. Pr. 291; s. c. 10 Abb. N. C. 180.

[2] Snow v. Winslow, 54 Io. 200.

[3] Cowdery v. Railway Co. 93 U. S. 352; International & Great Northern Railway Co. v. Wentworth (Tex. Civ. App.), 27 S. W. R. 680.

[4] Woods v. New York & New England Railroad Co. 61 Fed. R. 286.

freight at a specified rate from a point beyond the terminus of the road to a station on the road.[1]

A receiver appointed of one railroad has no power and cannot be authorized by the court to take possession of the road of another company which is not a party to the proceeding.[2] It has been said not to be improper for a receiver to advise, aid and encourage reorganization schemes which offer the prospect of securing the just measure of protection to the various interests connected with or concerned in the property and assets in the custody of the court; but he should not in his dealings with the property or any schemes of reorganization represent and promote one interest at the expense or to the prejudice of another entitled to the consideration and protection of the court and its officers.[3] The court instructed the receiver that he might with propriety and in the line of his duty endeavor to bring together the various conflicting interests upon some equitable basis or plan that would protect the property and assets of the insolvent railroad company.

It is a justification of a receiver's acts that they are the continuation of the same methods practiced by the company.[4]

It is improper, it has been said, for a receiver to procure supplies from or enter into contracts with a corporation composed of the officers of the insolvent railway company.[5] He has no power to proceed to condemn property.[6]

"Where the authority conferred on a receiver in operating a road is not shown, it will be presumed he was empowered to manage and operate the road under the duties and responsibilities of a common carrier for hire, and casts on him, officially, the same duties and obligations that were on the company. * * * But his authority, duty or liability will not be presumed to extend beyond the road so as to authorize him to make contracts for carrying freight over other roads of which he has no control, and thus make property placed in his hands for preservation liable for the failure of other

[1] Kansas Pacific Railway Co. v. Bayles (Col.), 35 Pac. R. 744. But the power of a receiver to contract to carry freight beyond the terminus of his line of railway has been denied. International & Great Northern Railway Co. v. Wentworth (Tex. Civ. App.), 27 S. W. R. 680.

[2] Hook v. Bosworth, 12 U. S. C. C. App. 208; s. c. 64 Fed. R. 443.

[3] Clark v. Central Railroad & Banking Co. 66 Fed. R. 16.

[4] Clark v. Central Railroad & Banking Co. 66 Fed. R. 16.

[5] Id.

[6] Minneapolis & St. Louis Railroad Co. v. Minneapolis & Western Railway Co. (Minn.) 63 N. W. R. 1035. In this case the power of the court to authorize the receiver to condemn property was denied by one of the judges.

companies to perform his contracts. * * * It cannot be assumed, in the absence of proof of the powers granted by the court, that it conferred upon a receiver powers in excess of those prescribed by statute and such as are incidental to them."[1]

When the insolvent railway company was authorized by its charter to construct a certain line of railroad, it was held that the receiver of the company succeeded to the same right, and that he could not be enjoined from completing the road.[2]

The power of receivers of a railway, with the sanction of the court, to pledge assets of the company to secure loans necessary to its operation, and to incur liability for the expenses of a refunding scheme has been declared.[3] But it was said that, if before such expenses are paid, creditors holding liens on the property are made parties, the payment of the expenses *ex parte* would not be allowed.

The opinion of the supreme court of the United States in the case of Chicago Deposit Vault Company v. McNulta,[4] upon the power of railway receivers to make contracts, is of special interest. The receiver of the Illinois division of the Wabash, St. Louis and Pacific Railway Company, Judge Cooley, leased from the plaintiff rooms in the Rialto Building at Chicago for four years, at an annual rental of $10,500. The order of appointment was in part as follows: "And the said receiver is hereby empowered and instructed to take possession of all of the said property described in said mortgage or appurtenant thereto, and to manage, control, and operate the said railroad described in said mortgage; preserve and protect all said property, and collect, as far as possible, all assets, choses in action, and credits due to said company, acting in all things under the orders of this court. * * * Said receiver shall also have authority, subject to the supervision of the court, to make such repairs to said railway and property as are necessary in his judgment for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this court." The order provided for the payment of current expenses, taxes, traffic accounts due other roads, rentals upon rolling stock; and that the surplus be applied to bonded indebtedness.

The court, through Mr. Justice Jackson, said: "While there is

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[1] International & Great Northern Railway Co. (Tex. Civ. App.) 27 S. W. R. 680.

[2] Moran v. Lydecker, 27 Hun, 582. See following section as to receivers completing road.

[3] Clarke v. Central Railroad & Banking Co. 54 Fed. R. 556.

[4] 153 U. S. 554.

some want of harmony in the authorities upon the question as to how far a receiver may make and enter into contracts without the previous approval or subsequent ratification of the court, which shall be binding upon the trust, we are of opinion that the order appointing the receiver in this case was not broad enough in its terms to authorize him to enter into the lease in question so as to give it validity without the approval or confirmation of the court. It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or contracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities — like the one in question — must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust."

It was said in this case that the approval by the court of the receiver's expenditures for general offices was not a confirmation of the lease by the court. The query was submitted, whether the doctrine of estoppel would apply to the court.

If with full knowledge of all the facts the court approved the payment of rent, there is certainly no reason why the court of which the receiver was an officer should not have been subjected to the doctrine of estoppel. Certainly a court can adopt or ratify a contract made by its receiver without authority. And when it does so, the obligation is as binding and solemn as though between individuals. Courts should perform their obligations above all things.

Section 374. **Of the Power to Complete an Unfinished Line of Railway.** — The remedy of a receivership being primarily for the conservation of property in controversy *pendente lite*, the courts have shown great reluctance to engage in any undertaking affecting it which is not clearly germane to that purpose. But it sometimes happens that, in order to secure the full value of a line of railroad which is not completed, it is not only desirable but neces-

sary that the work of building should proceed, and the power to complete the construction of unfinished lines is conceded.[1] The practice was succinctly stated by Dillon, Circuit J., in Kentucky v. St. Paul & Pacific R. R. Co.:[2] "I assent in the fullest manner to the proposition that a court of equity ought not to enter upon the work of either operating or building a railway, if this can possibly be avoided without the certain and great sacrifice of the rights and securities of the parties in interest. * * * It is not to be inferred that authority even to complete the building of an unfinished line of railway, and to issue debentures for that purpose, is to be conferred without an overwhelming and irresistible necessity. When such authority is conferred it ought to be guarded with the utmost care."[3]

Even in cases where the necessity is so great as to warrant such unusual action the better course is to obtain, if possible, the consent of prior mortgagees, if any there be.[4] The power has, however, been exercised, without such consent first obtained, upon a showing that the success of the road depended upon its operation and completion;[5] or that a failure to complete within a time fixed by law would cause the lapse of grants of valuable land.[6] As the building or completing of a road necessarily involves the expenditure of money, the power to raise money by loans secured upon the property has naturally followed. This subject will be separately treated,[7] but it may be said here that its importance is so great that it justly affects in a very serious manner the decision of the court as to engaging in the work of completing unfinished lines. In South Carolina it has been held that the question of the necessity for building or finishing a road should be referred to a master for investigation and determination.[8]

Section 375. **Of the Power to Enter into Contracts — the Receiver's Discretion in Certain Classes of Contracts.**— It may be considered a general rule that a receiver of a railway has no power to enter into contracts unless he has been authorized to do so by

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[1] Pacific Railway Co. v. Wade, 91 Cal. 449.

[2] 5 Dill. 519, 525.

[3] See also Moran v. Lydecker, 27 Hun, 582.

[4] Meyer v Johnston, 53 Ala. 237.

[5] Miltenberg v. Logansport R. R Co. 106 U. S. 28; Bank of Montreal v Chicago, Clinton & W. R. R. Co. 48 Iowa, 518.

[6] Kennedy v. St. Paul & Pacific R. R. Co. 2 Dill. 548; s. c. 5 Dill. 519.

[7] See Chapter XIII on Receiver's Certificates, next following.

[8] Hand v. Railway Co. 10 S. C. 406; s. *sub nom.* Hand v. Savannah & Charleston R. R. Co. 17 S. C. 219.

the court. If he does, as he undoubtedly may, use the moneys belonging to the trust, for purposes connected with the trust, as he thinks proper, he does so upon his own responsibility, and takes the risk that the court may not finally approve his action; he cannot bind the trust by contract without the authority of the court.[1]

But in practice it has been found that the receiver must be allowed a certain discretion in matters of detail in operating railroads, in order that he may discharge his duties to the best advantage. Thus it was said by Mr. Justice Bradley, in Cowdrey v. The Railroad Company,[2] that "all outlays made by the receiver in good faith in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump. * * * In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed."[3]

[1] Lehigh Coal & Navigation Co. v. Central R. R. Co. 35 N. J. Eq. 426, 429.

[2] 1 Woods, 331, 336.

[3] In this case, which arose upon exceptions to a master's report upon the expenditures of a receiver, the court allowed charges for rebatement of freight, on the ground that it was customary and necessary to secure business; the purchase of a truck wagon and harness for delivering freight in a city because necessary for the accommodation of customers and to compete with other carriers; the purchase of weighing scales because procured in good faith and for no possible advantage to the receiver himself, they remaining the assets and property of the road; rent for extra offices on the ground that they were needed, and for interest paid for money temporarily borrowed, because the loan was necessary in order to carry on the operation of the road. Rebates upon freight were also allowed in *Ex parte* Benson, 18 S. C. 38, and money necessarily borrowed to operate the road was allowed to be repaid out of the income in *Ex parte* Carolina Nat. Bank, 18 S. C. 289. But money spent by a receiver unnecessarily or not directly for the good of the property, as for the defeat of a subsidy in aid of a parallel road, will not be allowed, even though it appear that the

The principle here involved was recently applied in a case where it was held that a receiver of an insolvent railroad corporation has authority, as necessarily incident to the duties imposed upon him, to make such contracts for labor and supplies as are reasonably necessary to enable him to perform the duties of his appointment, and that his contracts for such purposes will bind the trust.[1]

Section 376. **Of the Receiver's Right to the Protection of the Court in the Operation and Management of a Railroad.**—The general subject of the protection by the court of a receiver in the possession of the property placed in his keeping having been already discussed, it is only necessary, in this place, to add that such protection extends also to preventing his being subjected to actions at law, or suits in equity, which endanger the earnings of the road operated by him unless by leave of court. If the party bringing suit be within the jurisdiction of the court which appointed the receiver, he will be restrained by injunction from prosecuting his suit, even though it be in a foreign jurisdiction, the proceeding being against him personally and not against the court whose authority he has invoked. Disobedience of the injunction will subject the offender to proceedings in contempt.[2]

The court will, through its marshal, protect and preserve the property entrusted to its receiver, and insure its management and operation.[3]

Section 377. **Of the Powers of Railway Receivers as to Contracts made by the Company Before their Appointment.**—Money due upon contracts entered into by a railroad corporation before the appointment of receivers, and which does not constitute a lien upon the property of the company, is part of the general indebtedness of the road, and although binding upon it, is not to be paid by the re-

construction of the new road would be a serious detriment to the road in his possession. Cowdrey v. Galveston, H. & H. R. R. Co. 93 U. S. 353.

[1] Lehigh Coal & Nav. Co. v. Central R. R. Co. 41 N. J. Eq. 167, 175 (1886).

[2] Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792; s. c. affirmed, 50 Vt. 500. See this case and Langdon v. Vermont & Can. R. R. Co. 53 Vt. 228; s. c. 54 Vt. 593, as to the effect of a decree by consent terminating a receivership over a railway, the receivers still continuing in possession of and operating the road as managers. Andrews v. Smith, 5 Fed. Rep. 833, as to their liability to an accounting in a subsequent action by mortgage bondholders in a federal court, and the effect of a plea to such action of the pendency of the former proceedings in the state court. Middleton v. New Jersey West Line R. R. Co. 25 N. J. Eq. (10 C. E. Green) 306, as to the right or power of the receiver of a railway company, under the laws of New Jersey, to sell the property, rights and franchises of the company, free from liens and encumbrances.

[3] *In re* Acker, 66 Fed. R. 290.

ceiver. Such payment would clearly be giving a preference to creditors of equal right and would defeat the object of foreclosure.[1] But such contracts may be carried out by the receivers if necessary or if clearly beneficial to the trust.[2] Where the order of appointment authorized the receiver to pay amounts due and maturing for materials and supplies for the operation of the road, the court limited its construction to the payment of such obligations as were necessary to preserve the line in good running condition, and refused to direct the receiver to pay obligations which had been incurred long before his appointment, considering the rights of the mortgagees of primary importance as contrasted with them.[3]

It has been held in New Jersey, where two railroad companies entered into a contract for the use by one of them of the tracks and terminal facilities of the other, and both companies afterwards became insolvent and were placed in the hands of receivers by the same court, that the contract might be modified by the court upon the application of either of the receivers, so as equitably to re-adjust the rates agreed upon by them for the terminal facilities, and for the use of part of the road by the other company, it being shown that the modification was beneficial to one of the trusts and not injurious to the other.[4]

Section 378. **Further as to the Rights and Liability of Receivers Under Contracts of the Company Other than Leases—Payment of its Debts.**—The liability of a receiver on the executory contracts of the defendant made prior to the appointment, including leases, has been fully presented in a previous section.[5] The proposition there asserted, that a receiver is not appointed for the purpose of performing the defendant's contracts, but to preserve and protect the property committed to him, is applicable to receivers of railways.

If a railway receiver enjoys the benefits of a prior contract he must also bear its burdens. Where a receiver continued the use of Pullman cars under a contract with the company, and his acts constituted an adoption of it, he was adjudged obligated to perform the contract.[6]

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[1] Ellis v. Boston, Hartford & Erie R. R. Co. 107 Mass. 1; s. c. *sub nom.* Graham v. Boston, Hartford & Erie R. R. Co. 118 U. S. 161.

[2] Ibid.

[3] Brown v. New York & Erie R. R. Co. 19 How. Pr. 84.

[4] *In re* New Jersey & New York Ry. Co. 29 N. J. Eq. 67.

[5] Sections 327 and 328; and see section 379

[6] Easton v. Houston & Texas Central Railway Co. 38 Fed. R. 784.

An oil company contracted with a railway company to purchase certain rolling stock and lease the same to the latter at an agreed rental, it agreeing to purchase the same at a certain time or return the property at the expiration of the contract in good order. It was held that the receiver did not, simply by virtue of his appointment, become liable upon the covenants and agreements of the contract; that upon taking possession of the property he was entitled to a reasonable time to elect whether he would adopt the contract and make it his own or insist upon the inability of the company to pay, and return the property in good order.[1]

The supreme court of Texas has said: "It is a mistake to assume that a receiver empowered to take possession of, control and operate a railway is in no sense the representative of the corporation that owns it. * * * It is also erroneous to assert that a court appointing a receiver is under no obligation to continue in force, and in some cases to cause to be fulfilled, the contracts of the company, though they may have been improvidently made. The continuance of the obligation of contracts is not dependent on the will or act of the court, nor can a court in any proper case refuse to execute them. It is true, however, that it is not every contract the company may have made which the court administering its property through a receiver will cause to be satisfied out of the funds subject to its control; for that must depend on the right to be paid out of the earnings or proceeds of the property in the hands of the court."[2] It was said that where the receiver enjoys the benefit of a contract he must assume its burdens.

It was held in the case cited that the insolvent corporation having contracted with plaintiff for a right of way on condition that the company would erect and maintain a water tank on plaintiff's land, to be supplied with water from an elevated spring thereon, and that the plaintiff was to be paid as much per month as the company should pay any other person on its line for like privilege or services, that the receiver must comply with the terms of the contract, although he had ceased to use the water, but without the direction of the court to do so; for, it was said, had application been made for leave to discontinue use of and payment for water, this in good conscience could not have been granted under the facts proved without making compensation to plaintiff, for expenditures, as well as such loss as he might otherwise sustain because of breach of contract.

[1] Sunflower Oil Company v. Wilson, 142 U. S. 313.

[2] Howe v. Hardy, 76 Tex. 17.

A receiver of a railroad is not bound by an agreement made before his appointment between the railroad company and its employes, by which the latter are not to be discharged except for cause, to be determined by arbitrators. "These provisions," said the court, "cannot be binding upon others than the immediate parties; and, so far as the same affect the receiver, are repugnant to the order of the court placing the railway under his control and management."[1]

Nor is the receiver bound by the company's contract providing for rebate of freight charges, unless he adopts it.[2] The payment of a portion of the rebates which accrued before he entered upon the discharge of his duties was said not to constitute an adoption of the contract.

The receiver may adopt or disregard the executory contracts of the company.[3]

The liability of the receiver of a railroad on the contracts of the company and to pay its debts has thus been commented upon: "It is well settled that the receivers of an insolvent railroad corporation, appointed by a court of chancery to preserve its property and operate its railroad, do not stand in the shoes of the corporation. They are neither representatives of the insolvent corporation, nor of its creditors or stockholders. They are the officers and representatives of the court, the hands of the court, in which it holds the property while it operates the railroads of the insolvent corporation for the benefit of those ultimately entitled to the property and the income. The court is not bound to pay the debts nor to perform the obligations of the insolvent, nor are its receivers. No one ever contends that the obligations of the insolvent corporation to pay its debts are assumed by the receivers. The only difference between the liability of such receivers to pay the debts and their liability to perform the executory contracts of an insolvent corporation is, that the consideration of the former is generally received by the insolvent, while the consideration of the latter may be obtained by the receivers; and if for an unreasonable length of time they accept the benefits, they may thereby assume the liabilities of such contracts."[4]

In an action against a receiver to recover damages for breach of the company's contract to maintain a switch on plaintiff's land it

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[1] *In re* Seattle, Lake Shore & Eastern Railway Co. 61 Fed. R. 541.

[2] Kansas Pacific Railway Co. v. Bayles (Col.) 35 Pac. R. 744.

[3] Scott v. Rainier Power & Railway Co. (Wash.) 42 Pac. R. 531.

[4] Ames v. Union Pacific Railway Co. 66 Fed. R. 966.

was said, in denying the receiver's liability: "He is appointed, not to carry out the proprietor's contracts, but to manage and preserve the property. So the receiver of a railroad company is no more bound to do a particular thing which the railroad has contracted to do, than he is liable to pay a debt which the company has contracted to pay."[1]

A receiver will not be required in an action for specific performance to perform a contract of the company to transport freight.[2] But where a "pooling" contract was entered into by two railroad companies and had been fully executed, and profits therefrom had been collected and were held by the receiver of one of the companies, he was ordered to pay over to the other company its share thereof, without regard to the validity of the contract.[3]

The rule here announced is not reciprocal and in such respect is anomalous. However burdensome the contract may be to the other party, he must perform it if the receiver so demands. "This rule," it has been said, "not infrequently constitutes one of the chief considerations for a foreclosure. It furnishes an easy and speedy mode of getting rid of all the unprofitable and embarrassing executory contracts of the railroad company."[4]

Section 379. **Of the Effect of the Appointment on Leases to the Company — Liability of Receiver Under Lease — Payment of Rentals.** — The principles which are applicable to the subject of this section are the same as those which control the liability of receivers generally under contracts and leases of the defendant, which have been stated in the preceding and other sections.[5] The mere appointment of a receiver of a railroad company does not bind him to perform the leases to the company. He has a reasonable time in which to decide whether it be to the interest of the receivership to perform or disregard the leases. But it is incumbent on the receiver to affirmatively reject the lease within a reasonable time, otherwise they will be deemed to have adopted it.

The subject may be elucidated by reference to the cases concerning it.

Where receivers are appointed for a railroad company operating leased lines, they have a reasonable time to determine whether they

[1] Brown v. Warner, 78 Tex. 543; Commonwealth v. Insurance Co. 115 Mass. 278; *In re* Brown, 3 Edwards' Ch. 384; Ellis v. Railway Co. 107 Mass. 1.

[2] Central Trust Co. v. Marietta & N. G. Railway Co. 51 Fed. R. 15.

[3] Central Trust Co. v. Ohio Central Railroad Co. 23 Fed. R. 306.

[4] Judge Caldwell in 30 Am. L. Rev. 161.

[5] See sections 327 and 328.

will adopt the lease or will merely pay the lessor the net earnings of its road, subject to the lessor's right to re-enter for conditions broken. But where the lessor immediately demands of the receivers and of the court, either an adoption of the lease or the surrender of the road, and against its protest a decision is delayed for several months, in order to determine which policy is expedient, then the receivers should equitably pay the full rental during the full time of their possession. "When the court," said Jenkins, C. J., "upon the petition and at the prayer of the complainant, appoints receivers, who are directed to take possession of the leased lines of railway operated in connection with the main line, such receivers take possession by order of the court, and do not, therefore, by the mere act of such possession, become assignees of the term; they having, so to speak, a breathing space to determine whether or not they will assume the covenants of the lease."[1]

But for the time the receivers use the leased property they must pay the rentals.[2]

It is the duty of the receiver to take possession of a leasehold estate, if it be included within the order of the court; but he does not thereby become the assignee of the term, but holds the property as the hand of the court, and is entitled to a reasonable time to ascertain its value before he can be held to have accepted the lease.[3]

Where a receiver took possession of certain cars which had been leased to the insolvent railroad company, and continued to use them, it was held that he was not liable for conversion, and that rentals due would not be made a lien on the *corpus* of the property.[4]

The receiver of a railroad company was authorized in his discretion to pay rents due and to become due upon the lease held by the Erie Company, "in manner and form as provided by such leases

[1] Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 58 Fed. R. 257. The receivers of a railroad company cannot set off as againt a claim for rentals accruing against the leased lines during the receivership, any cross demands alleged to have accrued to the lessee prior to the receivership, since the two claims arose in different rights.

[2] Id.

[3] Quincy, Missouri & Pacific Railroad Co. v. Humphreys, 145 U. S. 82; Parks v. New York, Lake Erie & Western Railway, 57 Fed. R. 799; United States Trust Co. v. Wabash Western Railway Co. 150 U. S. 287; Central Trust Co. v. Wabash, St. Louis & Pacific Railroad Co. 34 Fed. R. 259; St. Joseph & St. Louis Railroad Co. v. Humphreys, 145 U. S. 105.

[4] Farmers' Loan & Trust Co. v. Chicago & Alton Railway Co. 42 Fed. R. 6. As to making rentals lien on the property, see also Quincy, Missouri & Pacific Railroad Co. v. Humphreys, 145 U. S. 82.

respectively." But he was not required, as the court further said in its order, to adopt and confirm any such leases, which, upon due inquiry, he should find not to be advantageous to all parties in interest. The court said: "When the receiver of the Erie Company took possession and operated the road, he also became liable, in effect, as assignee during the period of his occupancy. The foundation and nature of his liability was defined by this court when it said that 'he could not take possession of the property and enjoy its use and occupancy without incurring a liability for the payment of the rent under the lease by which his predecessor secured its possession. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally charged with the payment of rent under a lease for such time as he continued to occupy the property demised.'"[1]

The supreme court of the United States has asserted that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so, and that he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts.[2] But payment of the rent by the receiver for an unreasonable time will constitute an acceptance of the lease.[3] And such is also the effect of a continued use and operation of the leased lines.[4] Sixty-five days have been held not to be an unreasonable time.[5]

The payment of rentals, it has been held, should be made out of the earnings of the leased lines; and, even when they are not sufficient, should not be paid out of the earnings of the main line.[6] But the federal circuit court has not always followed such rule. Where it was important to keep the entire system intact, and the earnings of the leased lines were insufficient to pay the rentals, they were ordered paid out of the earnings of the main line.[7]

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[1] Frank v. New York, Lake Erie & Western Railroad Co. 122 N. Y. 197.

[2] United States Trust Co. v. Wabash Western Railway Co. 150 U. S. 287; Clyde v. Richmond & Danville R. R. Co. 63 Fed. R. 21.

[3] Moore v. Higgins, 5 N. Y. S. 895.

[4] Clyde v. Richmond & Danville Railroad Co. 63 Fed. R. 21.

[5] Ames v. Union Pacific Railway Co. 60 Fed. R. 966; Quincy, Missouri & Pacific Railroad Co. v. Humphreys, 145 U. S. 82. And it was held that the receivers would not be held liable for rentals for such time the receivers used the lines.

[6] Quincy & Missouri & Pacific Railroad Co. v. Humphreys, 145 U. S. 82.

[7] Mercantile Trust Co. v. St. Louis & San Francisco Railway Co. 71 Fed. R. 601. The facts in the case were said to be different from those in Quincy, Missouri and Pacific Railroad Co. v. Humphreys, 145 U. S. 82.

There is one anomalous feature of the subject of this section. The right of the receiver to disregard the lease is not reciprocal. The lessor cannot renounce the lease on the appointment of a receiver, however burdensome it may be to him.

Section 380. **Of the Receiver's Power to Sell Securities Pledged to Him as Indemnity Against Loss on Account of a Debt of the Railroad.**—Where an insolvent railroad company being primarily liable for a temporary debt of the receivership, had placed property in his hands as security for its payment, and a third party had delivered to him certain mortgage bonds as additional security for his indemnity and protection on account of the debt, it was held by the court of errors and appeals of New Jersey, upon an appeal from the chancellor's order granting the petition of the receiver for leave to sell the bonds in satisfaction of the debt, that the relation of principal and surety existed between the insolvent company and the owner of the pledged bonds; and that, as the amount of the indebtedness was very large, and there were in the hands of the receiver undisposed of securities of the principal debtor of considerable value, if not adequate to the payment of the debt in full, it would be inequitable for the receiver to compel a sale of the property of the surety, pledged to him only as additional security for his protection and indemnity.[1]

Section 381. **Of the Liability of Receivers for Injuries to Passengers, Accidents to Cattle, Fires, etc., While Operating the Road.**[2]— Receivers who are operating railroads under the direction of the court may be held answerable, in their official capacity, for injuries sustained in the same manner that the corporation would have been liable.[3] Where a judgment for the negligent killing of stock was recovered against a railroad shortly after the appointment of a public receiver by the governor of Tennessee under the laws of that state, and the judgment was sought to be enforced against the re-

[1] Philadelphia & Reading R. R. Co. v. Little, 41 N. J. Eq. 519, 528; s. c. 7 Atl. Rep. 356; s. c. 5 Cent. Rep. 57 (1886).

[2] This subject will be further considered in the chapter upon Suits Against Receivers, *infra*.

[3] Winbourn's Case, 30 Fed. Rep. 167 (1886); Pope's Case, Id. 169 (1886); *Ex parte* Brown, 15 S. C. 518. Whether an action for an injury to an employe lies against a receiver in whose employment he was injured was questioned in Smith v. Potter, 46 Mich. 258; s. c. 9 N. W. Rep. 273. In Iowa the right to bring such an action is given by statute as construed in Sloan v. Central Iowa Ry. Co. 62 Iowa, 728; s. c. 16 N. W. Rep. 331, and in Central Trust Co. v. Sloan, 65 Iowa, 655; s. c. 22 N. W. Rep. 916.

ceiver, it was held that a receiver so appointed was a public agent, and as such, not liable for the wrongs and negligence of his employes, but only for his own wrongful acts or delinquencies, and that, to reach the issues and profits of a railroad in the hands of the receiver, the claimant must be able to show that his claim falls within the "costs and expenses" incident to the recivership, and that as the complainant did not show this, and the judgment was against the railroad company for wrongs committed by the company, the receiver was not personally liable.[1] The fact that a railroad is in the hands of a receiver does not make it any the less liable under the statute of Missouri for double damages for killing cattle.[2] Where property was destroyed by fire, caused by sparks from defective locomotives, before the appointment of a receiver of the railroad, but after the railroad company had made default in paying a debt secured by mortgage, the court refused to allow claims against the receiver for damages.[3]

Section 382. **Generally of the Liability of Receivers in Operating Railroads.**—A receiver of a railroad company, who is exercising the franchise of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchise. For any torts committed by his servants while operating the railroad, under his management, he is responsible under the principle of *respondeat superior*. The liability, however, is not personal, but in his official capacity only; and the damages for such torts are not to be recovered in suits against him personally, and collected on execution against his individual property, but in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the court appointing him has placed in his possession and under his control.[4]

The receiver of a railroad company who controls its operation is no less a common carrier because the property of the road is in the custody of the court; and as such carrier he is obliged to receive and transport cars and freight and to furnish accommodations to connecting lines to the same extent and in the same manner as are the proper officers of other railroad companies.[5]

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[1] Hopkins v. Connel, 2 Tenn. Ch. 323, 326.

[2] Central Trust Co. v. Wabash, St. Louis, etc. R. R. Co. 26 Fed. Rep. 12.

[3] Hiles v. Case, Receiver, etc. 9 Biss. 549.

[4] McNulta v. Lockridge, 137 Ill. 270.

[5] Judge Gresham in Biers v. Wabash, St. Louis & Pacific Railway Co. 35 Am. & Eng. R. Cas. 646.

Where a receiver is appointed and ordered to preserve the system of the railroad intact he is liable for rent of the leased property accruing during the term of the receivership.[1]

A receiver of a railroad is warranted in continuing a pooling contract in affairs where it is for the benefit of the road. When such contract has been performed the receiver cannot set up its invalidity, but must account to the other contracting roads for money received under it. This because he has received the expected benefits to be derived from it, and must account for the fruits of its performance; and notwithstanding the contract was not binding on the receiver, and might have been objected to by him in due season.[2]

The liability of receivers operating a railroad is not the same as that of trustees, who, having bid off the property at a foreclosure sale under order of the court, and received a deed, operate the property for the benefit of the beneficiaries, and become personally liable as common carriers. They are in no sense receivers or officers of the court who are entitled to the immunities from the ordinary liabilities of persons conducting such business.[3]

Receivers who have exclusive charge and control of the property belonging to a railroad company, and of the management of its business, are bound to the same degree of care the corporation itself would have been under the management of its board of directors, and are in like manner liable, in their official character, for injuries resulting from the negligence of themselves or their agents or employes.[4]

The common-law rule that exempts the master from liability for an injury to an employe caused by the negligence of a fellow servant, is applicable to receivers.[5] Nor are receivers liable in an action for damages for personal injury which is barred by the statute of limitations.[6]

A receiver of a railroad company cannot avoid obedience to an order of court directing him to provide a farm crossing on certain land by showing that the court appointing him has placed no funds at his disposal with which to construct the crossing.[7]

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[1] Brown v. Toledo, Peoria & Western Railroad Co 35 Fed. R. 444.

[2] Central Trust Co. v. Ohio Central Railroad Co. 23 Am. and Eng. R. Cs. 666.

[3] Rogers v. Wheeler, 43 N. Y. 598.

[4] Fullerton v Fordyce, 121 Mo. 1.

[5] Youngblood v. Corner, 28 S. E. R. 509.

[6] Memphis & Charleston Railroad Co. v. Hoechner, 14 U. S. C. C. App. 469.

[7] Peckham v. Dutchess County Railroad Co. 145 N. Y. 385.

Receivers of a railroad are liable for repairs to a bridge, the expense of which is a charge on the trust fund.[1]

The mere turning over of the railroad property to the purchaser under the mortgage sale does not release the receivers from liability for injuries sustained by a passenger because of the negligence of the receivers' servants.[2]

The receiver of a railway was adjudged amenable to the writ of *mandamus* commanding the repair of streets which were disturbed in constructing the road.[3] It was said that the insolvency of the company and the demands of the creditors could not defeat the rights of the city.

"In cases of receiverships of railway property * * * receivers often operate railways and assume the duties, burdens and liabilities ordinarily imposed by law upon common carriers, in addition to the ordinary duties attaching to the position; but at all times they are only the agencies of the court, subject to its orders, and have no personal interest in the property in their hands resulting from the existence of the receivership, though responsible officially for the proper management and custody of property confided to their care; and, as other persons, personally responsible for their own unlawful acts working injury to others; but not so responsible for the negligent or wrongful acts of servants they may be compelled to employ in the business confided by the court to their management and control. When lawfully appointed they are not the representatives of the company or person whose property may be placed in their possession and under their management, though, they, in some cases, may be subjected to liability for charges arising under the permission of the courts appointing them, or from the negligence of themselves and their employes."[4]

Though the defect which caused the damage complained of existed before the appointment of the receivers, yet if they have had possession of the road sufficiently long to repair it, they are liable.[5] Receivers are liable for contracts made in their official capacity, and for torts committed by their servants and agents in the opera-

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[1] Central Trust Co. v. Wabash, St. Louis & Pacific Railway Co. 52 Fed. R. 908.

[2] Fordyce v. Chancy (Tex. Civ. App.), 21 S. W. R. 181. But this assertion was based on a statutory provision, which was said not to apply to receivers of a federal court: Fordyce v. Beecher, 21 S. W. R. 179.

[3] City of Ft. Dodge v. Minneapolis & St. Louis Railway Co. (Io.) 54 N. W. R. 243.

[4] Turner v. Cross, 83 Tex., 218.

[5] Bonner v. Mayfield, 82 Tex. 234.

tion of the road,[1] and for the acts of their predecessors and their servants and agents.[2]

When the same person is receiver of one railroad and lessee of another, and both are operated by him together, the leased road is not receivership property; and an employe can maintain an action at law against him, without leave of the court, to recover for injuries resulting from the negligence of his servants in operating the leased railroad. The receiver was permitted by the court to act as lessee of the other road; and it was held, that, as to all persons employed by him or having business relations with him in the conducting of such leased railroad, the receiver was not such in the sense that he was an officer of the court, but as a party *sui juris* acting as his own principal, and upon his own responsibility.[3]

Section 383. **The Construction and Effect of State Laws as to Railway Receivers of State and Federal Courts.**— The construction and application of state laws concerning the operation of railways, have given cause for controversy in respect of receivers.

Statutory provisions prohibiting discrimination in freight rates have been adjudged to include receivers of railroads, even though appointed by a federal court.[4]

The Kansas statute abrogating the common-law rule as to the liability of the master for injury to an employe caused by the negligence of a fellow-servant, reads: "Every railroad company organized or doing business in this State." This statute was declared by the federal and state courts to be applicable to receivers.[5] In Minnesota the same application has been given to a similar statute.[6] The contrary has been declared by the federal court in Georgia, but because the supreme court of that state had so construed the statute.[7] The supreme court of Texas has held that a receiver of a railroad is not a "proprietor, owner, charterer or hirer" within the

[1] Brown v. Warren, 78 Tex. 543.

[2] McNulta v. Lockridge, 137 Ill. 270; section 311 and cases cited.

[3] Lyman v. Central Vermont Railroad Co. 59 Vt. 167.

[4] Cutting v. Florida Railway & Navigation Co. 43 Fed. R. 747; Missouri Pacific Railway Co. v. Texas & Pacific Railway Co. 31 Fed. R. 862; Same v. Same, 30 Id. 2.

[5] Hornsby v. Eddy, 56 Fed. R. 461; Rouse v. Harry, 40 Pa. R. 1007; Rouse v. Hornsby, 14 U. S. C. C. App. 377; affirming s. c. 67 Fed. R. 219.

[6] Mickkelson v. Truesdale, 65 N. W. R. 260.

[7] Central Trust Co. v. East Tennessee, Virginia & Georgia Railway Co. 69 Fed. R. 353 and 357; Baltimore Trust and Guarantee Co. v. Atlanta Traction Co. 69 Fed. R. 358.

meaning of the words used in a statute concerning liability for death caused in operating a railroad.[1]

In New Jersey a statute required that suits for damages caused by negligence of "railroad corporations owning or operating railroads" in running railroad trains be commenced within two years. It was held that this statute was properly pleaded by a receiver in defence of such an action against him.[2]

It has been held that a statute of Ohio making a lessor railroad company liable for acts, injuries and wrongs inflicted by the officers, agents or employes of the lessee company, does not give a right of action against a lessor company for negligent acts of the employes of a receiver who is operating the road as receiver of the lessee company.[3]

It has been said that a state enactment providing that the discharge of a receiver while an action is pending against him shall not operate as an abatement of the suit, does not apply to receivers of federal courts.[4] But it has been held that the Texas statute making a railroad liable for acts of receivers after their discharge, when the property has been returned to the company, applies to receiverships in the federal court.[5]

The Kansas statute providing for damages where stock is killed by a railroad company, has been held to apply to receivers of railroads.[6]

It has been said that "at one time the notion prevailed in some quarters that when a federal court took a railroad into its custody and control through its receiver, the road was thereby taken out from under the operation of the constitution and laws of the state, and that the receiver was a law unto himself, and could operate the road without regard to the requirements of the state laws, and, indeed, contrary to the requirements of those laws." This "notion" was termed an "erroneous doctrine and practice."[7]

Section 2 of the act of Congress of 1887[8] puts at rest all controversy as to the amenability of federal receivers to state laws. "Such receiver or manager," it provides, "shall manage and operate such property according to the requirements of the valid laws of the

[1] Yoakum v. Selph, 83 Tex. 607; Turner v. Cross, 83 Tex. 218; Dillingham v. Blake (Tex. Civ. C. App.), 32 S. W. R. 77.

[2] Bartlett v. Keim, 50 N. J. L. 260.

[3] Chamberlain v. New York, Lake Erie & Western Railroad Co. 71 Fed. R. 686.

[4] Fordyce v. Beecher (Tex. Civ. App.), 21 S. W. R. 179.

[5] Missouri, Kansas & Texas Railway Co. v. Chilton, 27 S. W. R. 272.

[6] Rouse v. Redinger, 41 Pac. R. 483.

[7] Judge Caldwell in 30 Am. L. Rev. 161.

[8] Quoted in full in section 384.

state in which such property shall be situated in the same manner the owner or possessor thereof would be bound to do if in possession thereof."

Section 384. **Liability of the Railroad Company for Acts of Receiver.**— As already asserted the appointment of a receiver does not dissolve the railroad company.[1] Although the corporation remains in existence and may sue and be sued, and exercise its corporate functions, yet it may be stated as a general proposition that the company is not liable for the acts of the receiver.[2] Exceptions to this statement will be noted in reviewing the cases which concern the subject of this section.

The case of Godfrey v. Ohio and Mississippi Railway Company[3] was for damages for being ejected from a train while the road was being operated by a receiver. The receiver was operating the road under the order of the federal court. Afterward the possession of the property was returned to the railroad company by order of the court, subject to such orders as the court might thereafter make requiring the corporation to pay such claims and liabilities as the receiver might have incurred while in possession of the property. The order further required that all claims against the receiver should be presented to the court for adjudication within sixty days. The railroad company gave bond, as required by the court, to pay any and all debts or liabilities contracted by the receiver under the order of the court. The plaintiff purchased a ticket while the receiver was in charge of the property; but seeing that it was a mistake and not the ticket he had asked for, did not show it to the conductor, but paid his fare. After the return of the property to the company he attempted to use the ticket, and was ejected. It was held that the railroad company was not liable for the mistake of the receiver's agents. The doctrine was asserted that a railroad company, in the absence of a statute imposing liability, is not answerable for injuries resulting from the mistakes or negligence of the receiver or his agents while operating the road.

When the property is returned to the company and it is alleged and proved that the receivers expended the earnings, or some part of them, in repairing and equipping the property, the princi-

[1] Sections 205 and 349.

[2] Powell v. Dayton, Sheridan and Grand Ronde Railroad Co. 18 Oreg. 33; How v. St. Clair (Tex. Civ. App.), 27 S. W. R. 800; Memphis & Charleston Railroad Co. v. Hoechner, 14 U. S. C. C. App. 469; Chamberlain v. New York, Lake Erie & Western Railroad Co. 71 Fed. R. 636; Brockert v. Central Iowa Railway Co. 82 Io. 369; Ohio and Mississippi Railroad Co. 28 Ind. 558.

[3] 116 Ind. 80.

ple is well settled that the company may be sued and held liable for a tort committed by the receivers' servants,[1] but only to the extent of the funds so invested.[2] Under such circumstances, when the suit has been commenced against the receiver and he has been discharged, the company, it has been said, may, by amendment, be substituted as party defendant,[3] and the suit will be considered as continuous in respect of the statute of limitations. The company will not be liable unless the action is one that could have been maintained against the receiver.[4]

In passing upon the question of the liability of the company for the negligence of the receiver, when the earnings have been invested in betterments and the property returned to the company, the supreme court of Texas has said: "This conclusion has been reached from the equitable principle that the company has received the benefit of a fund which was primarily liable for the damages for injuries occasioned by the acts of the receiver."[5] But it was asserted that the company is not liable for the negligence of its receiver *ipso facto*, and that such liability exists only when it is alleged and proved that the earnings of the railway while in the hands of a receiver have been invested in betterments of the property, which has been returned to the company.

The opinion of the supreme court of Texas, prepared by Stayton, C. J., in the case of Texas & Pacific Railroad Company v. Gay,[6] is most elaborate and interesting; reference to which has been made in the section concerning the power of a court to appoint a receiver of property beyond its territorial jurisdiction.[7] The federal court in Louisiana appointed a receiver of the Texas & Pacific Railway Company, whose property was neither wholly nor partly in that state. The receiver took possession of and operated the road, and the company was sued for an injury sustained by reason of the receiver's negligence.

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[1] Texas & Pacific Railway Co. v. Brock, 83 Tex. 526; Texas & Pacific Railway Co. v. Adams, 78 Tex. 372; Texas & Pacific Railway Co. v. Comstock, 83 Tex. 537; Texas & Pacific Railway v. Huffman, 83 Tex. 286; Missouri, Kansas & Texas Railway Co. v. Wylie (Tex. Civ. App.), 33 S. W. R. 771; Texas & Pacific Railway Co. 79 Tex. 13.

[2] Houston & Texas Central Railroad Co. v. Crawford (Tex.), 31 S. W. R. 176. As to the liability of the purchaser of the receivership property for acts of receiver see section 788.

[3] Texas & Pacific Railway Co. v. Brock. 83 Tex. 526; Texas & Pacific Railway Co. v. Comstock, 83 Tex. 537; Texas & Pacific Railway v. Huffman, 83 Tex. 286.

[4] Texas & Pacific Railway Co. v. Collins, 84 Tex. 121.

[5] Texas & Pacific Railway Co. v. Huffman, 83 Tex. 286.

[6] 86 Tex. 571.

[7] Section 268.

It was asserted that the receiver was an officer of the court appointing him, and had only such power as the order of the court, under the general principles of law and due course of procedure, conferred on him, or which may have been conferred by statute, that his possession was the possession of the court, and that the property in his hands was *in custodia legis*. The court said: "From these considerations it must follow that the court cannot confer upon receivers power outside of the territory over which it has jurisdiction; for its process cannot be effective beyond that, unless authorized by statute to reach to other territory within the limits of the country to which the court belongs; and where the process of the court cannot reach and be entitled to enforcement and respect, its officers cannot have power."

It was held that the appointment of the receiver by the Louisiana federal court was void; that as the company permitted the receiver to take possession of its road and operate it, he is to be regarded as the company's agent, and that for his negligence the company was liable.

Where, through the collusion of a railroad company, a receiver is appointed over its property, who takes possession of and operates it, he will be considered as the representative and the mere agent of the company, and for his acts it will be liable.[1] It was said in the first case cited that if the appointment be made collusively for the benefit of the company and with its consent, for the purpose of placing its property beyond the reach of some class of its creditors, then the receiver will be the servant or agent of the company, for whose acts it will be responsible as though he had been appointed by its stockholders or directors.

In Texas it has been held that where judgment is rendered against the receiver before his discharge, it may be enforced against the company when the net earnings have been expended for betterments and the property returned to the company.[2]

The servants of the receiver of the Wabash Railroad Company constructed a platform across a public street. The State of Indiana sought to prosecute the company for the act; but the court declared that as the property was in the possession of the receiver and

[1] Texas & Pacific Railway Co. v. Johnson, 76 Tex. 421; Texas & Pacific Railway Co. v. Gay, 86 Tex. 571; San Antonio & Aransas Pass Railway Co. v. Adams (Tex. Civ. App.), 32 S. W. R. 783.

[2] Texas & Pacific Railroad Co. v. Griffin, 76 Tex. 441; Texas & Pacific Railway Co. v. Overheiser, 76 Tex. 437; Texas & Pacific Railway Co. v. Miller, 79 Tex. 78; Garrison v. Texas Pacific Railway Co. 30 S. W. R. 725 (Tex. Civ. App).

under his exclusive control, the corporation could not be "prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver." [1]

Where a railroad company accepted the return of the property under an order of the court imposing the condition that the property should be liable for all demands and liabilities incurred by the receivers in operating the road, it was held that the company was liable for damage caused by the negligence of the receivers, and without any showing that any part of the earnings had been expended by the receivers in improving the property.[2]

Section 385. **Controversies Between Receivers and Employes — Wages — Labor Organizations — Strikes.** — Where prior to the appointment of a receiver the relations between the railway company and its employes and their rates of wages had been determined mainly by certain rules, regulations and schedules, it was held that such schedules and wages must be presumed to be reasonable and just, and that new schedules of reduced wages adopted by receivers without notice to the employes or their representatives would not be approved by the court, although recommended by the majority of the receivers, one only of them being a practical railroad manager, and he testifying that the new schedule should not be put into force without some modifications.[3]

In the case cited Caldwell, C. J., said: "When a court of equity takes upon itself the conduct and operation of a great line of railroad, the men engaged in conducting the business and operating the road become the employees of the court and are subject to its orders in all matters relating to the discharge of their duties, and entitled to its protection. The first and supreme duty of the court when it engages in the business of operating a railroad is to operate it efficiently and safely. No pains and no reasonable expense are to be spared in the accomplishment of these ends. * * * An essential and responsible requisite to the safe and successful operation of the road is the employment of sober, intelligent, experienced and capable men for that purpose."

Judge Caldwell also said of labor organizations, in the same case: "Men in all stations and pursuits in life have an undoubted right to join together for resisting oppression, or for mutual assistance,

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[1] State v. Wabash Railway Co. 115 Ind. 466; s. c. 17 N. E. R. 909; Johnson v. Lewis, 115 Ind. 490.

[2] Missouri, Kansas & Texas Railway Co. v. Chilton, 27 S. W. R. 272.

[3] Ames v. Union Pacific Railway Co. 62 Fed. R. 7.

improvement, instruction and pecuinary aid in time of sickness and distress."

The federal court in another circuit, in a contest between the receivers of the Philadelphia and Reading Railroad Company and their employes, refused to prohibit the receivers from enforcing a rule of the company against the employment of members of any labor organization.[1]

In still another circuit the federal court has, in a controversy between its receivers and railway employes, approved of labor organizations.[2] In the case cited it was said that the receiver is the agent of the court in operating the road; that the petitioners were the employes of the receiver, and, therefore, the employes of the court; that a petition to the court as their employer not to reduce wages, or for relief from any substantial grievance, would be entertained, but in passing upon it the court would exercise its discretion. A reduction of the wages of ten per cent. was sustained as being reasonable, because of a general business depression.

Employes of the receivers of the Toledo, St. Louis and Kansas City Railroad Company petitioned the court, Ricks, J., to require the receivers to set aside a schedule of wages fixed by them, offering to show that there was no necessity for the reduction of wages as made by the schedule. It was held that any controversy between receivers and their employes would be heard and determined by the court upon proper application; which, when properly made, should be entertained by the court, and, "if the allegations are of a character to make it proper to further consider them, the receivers should be required to file an answer thereto."[3] It was further said by Judge Ricks that where a receiver is empowered by the court to manage the business over which he is appointed, he may employ such persons as may be necessary for the purpose, and with the exercise of discretion concerning such employment the court will not interfere, unless some abuse is shown; that courts are not constituted to manage and operate railroads; that the manner of employing servants can be better determined by the receivers, who are experienced and have ability in the business, and the court will rely upon the experience and judgment of the receiver to wisely and economically administer the trust. He refused the application,

[1] Platt v. Philadelphia & Reading Railroad Co. 65 Fed. R. 660.

[2] Thomas v. Cincinnati, New Orleans & Texas Pacific Railway Co. 62 Fed. R. 803.

[3] Continental Trust Co. v. Toledo, St. Louis & Kansas City Railroad Co. 59 Fed. R. 514.

saying that only where an abuse of authority by the receiver is clearly shown would he interfere.

The statement of Judge Caldwell that receivers of a railroad must employ competent and efficient men to operate the road, was approved in the case of the United States Trust Co. v. Omaha & St. Louis Railway Company,[1] where it was said to be the duty of receivers to give notice of and invite their employes to a conference respecting any proposed reduction of wages. In this case the master reported against a reduction of wages, but the court rejected the report and ordered a reduction.

The reinstatement of striking employes has been refused because, as the court said, "to do so would cause the removal of competent men who served the receiver under adversity."[2]

As to the adjustment of difficulties between receivers and their employes the federal court has said: "It is competent for a court to adjust difficulties between the receiver and his employes, when it otherwise would tend to injure the property and defeat the purpose of the receivership. The court may direct a suitable arrangement with the employes or officers as to compensation and conditions of employment."[3]

Section 386. **Miscellaneous Matters — Service of Process — Where Sued—Charitable Payment to Injured Employe—Abatement of Nuisance—Reorganization Plan and Termination of Receivership.**—Process against railway receivers need not be served on them personally, but is valid and binding when served on their agents.[4] Such service is recognized and declared good by act of congress.[5]

Receivers of railroads may be sued in any county which the line penetrates. They are supposed to reside in every such county.[6]

It has been held to be a just and good policy for receivers of railways to pay an injured employe his wages during the time of his disability, he having been injured while in the discharge of his duty, without contributory negligence, though the receiver would not be liable in law for damage to such employe.[7]

The same humane doctrine was enforced in another federal

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[1] 63 Fed. R. 737.

[2] Booth v. Brown, 62 Fed. R. 794.

[3] Waterhouse v. Comer, 55 Fed. R. 149.

[4] Central Trust Co. v. St. Louis, Arkansas & Texas Railroad Co. 40 Fed. R. 426.

[5] 24 U. S. Stats. 554; Proctor v. Missouri, Kansas & Texas Railway Co. 42 Mo. App. 124. Sec. 386.

[6] Ball v. Mabry, 91 Ga. 781.

[7] Missouri Pacific Railroad Co. v. Texas & Pacific Railroad Co. 33 Fed. R. 701; Same v. Same, 41 Fed. R. 319.

judicial district, where an employe of a receiver of a railroad was injured without any negligence on the part of the receiver or his employes, it being asserted that the injured employe should be paid his wages for the time he was disabled, as "ordinary humanity and right feeling" dictate; but that such "contribution" should be confined to faithful and deserving employes, who merit consideration from their employer. "It is not every case of an injured employe that would require the payment to him of his wages."[1]

A nuisance created by a railroad being operated by a receiver will not be abated in an ordinary action; but under the rules and regulations of the court having the custody of the property.[2]

The court will grant leave to receivers of railroads to enter into an agreement for partial readjustment of the affairs of the company, when such agreement will put the stockholders and creditors of the company under no obligation to accept or reject the same. But the court will not pass upon the comparative merits of rival schemes of reorganization, but will regard with satisfaction any and every legitimate effort to terminate the receivership.[3] It was said in the case cited that "the appointment of receivers is an extraordinary remedy, and should be a temporary one," that it is a beneficent one in many cases, but when extended and continued for an unreasonable period "is a great abuse and a great evil."[4]

IV.

Of the Priority of Claims Against the Receiver — Of Preferential Debts of the Company.

Section 387. **Of the Power of the Court to Give Priority to Claims.**—That, in a proceeding to foreclose a mortgage and to compel the sale of the mortgaged property for the purpose of paying the debt secured upon it, courts should declare debts of any kind subsequently contracted to be a prior lien, seems, at first sight, to be unreasonable and unjust and that they should authorize and direct their officer in possession of such property to borrow money and make the loan a lien above all other encumbrances, seems still more unreasonable. But the peculiar nature of railroad property, in that its chief value consists in its continuous operation, and the fact that the general public

[1] Thomas v. East Tennessee, Virginia & Georgia Railway Co. 60 Fed. R. 7.

[2] Brown v. Carolina Railroad Co. 88 N. C. 128.

[3] Platt v. Philadelphia & Reading Railroad, 65 Fed. R. 872.

[4] See section 839.

has a direct and important interest in the uninterrupted use of the road, together with the long established principle that it is the duty of the court to preserve the property and not to allow it to deteriorate so as to cause a loss to those interested in it, have compelled courts not only — as we have seen — to manage and operate railroad lines, but, in order to do so, to provide the means for securing supplies, labor and other necessities. Though this right has often been questioned, and was formerly strenuously opposed, it may now be considered as definitely settled.[1] Indeed, of late years, the custom is for courts to direct receivers, in the order by which they are appointed, to pay all necessary expenses of operating and managing the road out of the earnings; and further orders will be made to meet such extraordinary expenses, or deficiencies, as may arise afterward.[2]

Section 388. **Of the Debts Incurred by the Receiver in Operating the Road.**— The fact that receivers with power to manage and operate railroad property, are appointed at the suit of bondholders in proceedings to foreclose their liens and for their own benefit, implies consent on their part that all expenses incurred by the receiver in the duties of his office shall be paid out of the fund in his hands. Since it is impossible for him to operate a road without incurring debts, it is entirely reasonable that the property which is to be benefited by his management shall bear the cost of it. It is equally reasonable that his necessary expenses in operating and managing the road shall constitute a lien in preference to all other obligations; otherwise he would be unable to secure supplies or employ assistance.[3]

An additional reason for recognizing this principle has been stated to be that, as the mortgagee has invoked the extraordinary aid of a court of equity by obtaining the appointment of a receiver, instead of availing himself of the ordinary remedies at law to obtain possession and enforce his lien, a court of equity may impose such reasonable conditions to the relief sought by him as it may deem are required by all the circumstances of the case. And when a

[1] Wallace v. Loomis, 97 U. S. 146, 162, quoted, *supra*, section 340. See also the chapter on Receiver's Certificates, next following.

[2] Hale v. Nashua & L. R. R. Co. 60 N. H. 333; Miltenberger v. Logansport R. R. Co. 106 U. S. 286.

The following chapter upon Receiver's Certificates should be read in connection with this section.

[3] Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport R. R. Co. 106 U. S. 286. See also Taylor v. Phila. & Reading R. R. Co. 7 Fed. Rep. 377; Atkins v. Petersburg R. R. Co. 3 Hughes, 307. *Contra*, Denniston v. Chicago, Alton, & St. Louis R. R. Co. 4 Biss. 414.

mortgagee has delayed the enforcement of his rights after default, and allowed the corporation to incur new debts for operating expenses and for the maintenance of its property, the contention becomes still stronger and more effective.[1] Debts incurred by the receiver in operating the road are held to be capable of assignment, the preference as to payment being considered as being attached to the debt itself and not to the creditor.[2] But expenses attending negotiations among bondholders having in view the sale of the road and its purchase by them, have been considered as not proper to be paid by the receiver, especially as it appeared that there was no surplus in the receiver's hands, and that it was not certain that the negotiations would be carried into effect and the sale made in pursuance thereof.[3]

Upon the subject of this section this has been said: "When claims against a fund or property in the hands of a receiver are presented to the court, the practice is to refer the claims to the receiver, with directions to him to ascertain whether the claims are just; and, if he so finds and reports, the court allows the claims. * * * When property is in the hands of a receiver that ought to be used, and its preservation or use requires an expenditure for the employment of labor upon or in connection with it, or other reasonable and necessary expenditures for a like purpose, such expenditures ought to be paid out of the earnings or proceeds of the property. The necessity for the application of this principle is most apparent when the property consists of a railway operated for the public convenience and benefit. * * * Such expenditures benefit its owners and incumbrancers. It would be inequitable for the holders of the trust deed to take the road and the proceeds of its use discharged from liens, before the claims of the petitioners, and to apply them to the payment of its bonds. Though the petitioners performed the labor for which they ask compensation in the operation of the road before the receiver took possession of it, the proceeds of its use and the benefit from its continued use were the result in part of the petitioners' labor, and the payment thereof should precede the payment of the debt secured by the deed of trust."[4]

[1] Union Trust Co. v. Soutter, 107 U. S. 591; Douglas v. Cline, 12 Bush, 608; Fosdick v. Schall, 99 U. S. 235; Burnham v. Bowen, 111 U. S. 776.

[2] Burnham v. Bowen, 111 U. S. 776; Union Trust Co. v. Walker, 107 U. S. 596. But see, *contra*, Skiddy v. Atlantic, M. & O. Ry. Co. 8 Hughes, 320.

[3] Central Trust Co. v. Wabash, St. Louis & Pacific R. R. Co. 25 Fed. Rep. 69. See further the chapter on Receiver's Certificates, *infra*.

[4] Litzenberger v. Jarvis-Conklin Trust Co. 8 Utah, 15. See section 398.

Section 389. **Of the Debts Incurred for Completing an Unfinished Line.**— In several instances courts have authorized receivers to complete unfinished roads, to construct bridges and make other permanent improvements when the best interests of all concerned clearly made such action necessary, and have given the debts incurred thereby priority over the encumbrances. Thus a receiver has been empowered to construct a branch line out of the income derived from the receivership, in that way greatly benefiting the property in his hands and increasing its revenues; and the court refused to hear objections to the expenditure so incurred when the parties applying had remained silent for more than two years.[1] A federal court has authorized a receiver to complete an unfinished road, in order to prevent the lapse of a land grant;[2] and another directed its officer to complete an additional line and a bridge as a part of the main line, the expense to be paid out of the income, with priority over the mortgage indebtedness.[3]

Section 390. **Of Preferential Debts for Wages, Labor, Materials and Supplies.**— The practice of the courts in regard to allowing priority in payment of wages earned and materials furnished before the appointment of a receiver seems to have been founded upon the principle that the interests of bondholders and other creditors require that the line of a railroad shall be kept in uninterrupted operation and because such debts would have to be paid by the company if no receiver were appointed.

In a late case in the supreme court of the United States it was held that items for wages due employees of a receiver, within six months immediately preceding his appointment; debts due to other railroad companies, and for supplies and damages; debts incurred for the ordinary expenses of the receivers in operating the road, may be allowed priority out of the earnings and, if there is no income fund, after scrutiny and opportunity for those opposing to be heard, then out of the trust property itself.[4] The limit of six months has been fixed in several cases, but there seems to be no

[1] Gilbert v. Washington City, V. M. & G. S. Ry. Co. 33 Gratt. 586. As to the course when the order authorizing the construction of an extension out of the surplus income reserves a lien upon such extension to materialmen, see Hand v. Savannah & C. R. R. Co. 17 S. C. 219.

[2] Kennedy v. St. Paul & Pacific R. R. Co. 2 Dill. 448; s. c. 5 Dill. 519.

[3] Miltenberger v. Logansport R. R. Co. 106 U. S. 286; Barton v. Barbour, 104 U. S. 126. See, also, the chapter on Receiver's Certificates, next following.

[4] Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434 (1886). To the same effect see Duncan v. Trustees of Chesapeake, etc., R. R. Co. 9 Am. Ry. Rep. 886.

good reason why any time should be arbitrarily named. The question to be considered in this class of cases, evidently is whether the claim has become stale, whether it has sunk into what is called an ordinary floating debt, and this must of necessity, be left for decision upon the facts of each particular case.[1]

It has been held that if it has become a floating debt it will not be entitled to preference,[2] where the default in payment of interest occurred more than eight months before a receiver was appointed, wages earned after the default and before the appointment were given priority, though no special equities were shown.[3] In another case claims for labor done during the year preceding the appointment, which had not been assigned, were allowed against the receiver's net income;[4] and, in a later case, it was held that it is not material whether the claims have been assigned or not.[5] So, also, priority has been allowed upon claims for services rendered during the two years before the receiver was appointed.[6] The practice has been carried still further in a case where notes, given by a railroad company for money used to pay for wages due so as to avoid a strike which was threatened, and which were to be paid out of the net income, were given preference in payment out of the income of a receiver appoined twenty-two months after the transaction.[7]

In the same way that courts allow priority to wages earned before the appointment of a receiver, they also give preference to debts due for supplies, etc., furnished before the appointment — unless such debts have become so stale as to be a part of the floating indebtedness. In a leading case it was broadly held that the net earnings of a receiver are not exclusively or necessarily the property of the mortgagees, but may be disposed of by the court, if necessary, to pay such claims as present superior equities, and the court gave preference to a claim for materials and supplies furnished before the receiver was appointed but used by him while operating the road, out of the net income, although the claim was in the shape of a note given three years before the appointment.[8] And the

[1] Turner v. Indianapolis, B. & W. R. R. Co. 8 Biss. 315.

[2] Duncan v. Mobile & O. R. R. Co. 2 Woods, 542; Brown v. New York & Erie Railway Co. 19 How. Pr. 84; Huidekoper v. Locomotive Works, 99 U. S. 258.

[3] Douglas v. Cline, 12 Bush. 608.

[4] Skiddy v. Atlantic, M. & O. R. R. Co. 3 Hughes, 320.

[5] Union Trust Co. v. Walker, 107 U. S. 596.

[6] Williamson v. Washington City, V. M. & G. S. R. R. Co. 83 Gratt. 624. See, also, generally, as to time, Central Trust Co. v. Texas & St. Louis Ry. 22 Fed. Rep. 135.

[7] Atkins v. Petersburg R. R. Co. 3 Hughes, 307.

[8] Hale v. Frost, 99 U. S. 389.

same court approved the action of a lower court in authorizing its receiver to pay, in preference to the mortgage indebtedness, amounts due for materials and repairs, and for ticket and freight balances due to other roads before the receivership, as well as for rolling stock purchased by the receiver and expenses in completing an additional line and a bridge.[1]

Section 391. **Further as to Preferential Debts — Imposing Conditions as to Payment of.** — The term "preferential debts" has been so used and applied by the courts that it may be defined to mean the debts of the company contracted and incurred prior to the appointment of the receiver, which, because of principles of equity and justice, are to be paid first and in preference to the mortgage debt.[2] The term "prior claims" is used generally to designate indebtedness incurred by the receiver in operating the road, which is entitled to priority relative to the payment of the mortgage debt. In such sense will the terms be used in this work.

Preferential debts are said to be those which have aided to conserve the property of the railroad company, and resulted in benefit to the bondholders, and which were contracted within a reasonable time prior to the receivership.[3] The term includes debts for labor, supplies, equipment or any permanent improvement of the property, or which result from "indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."[4] Claims for personal in-

[1] Miltenberger v. Logansport R. R. Co. 106 U. S. 286. See two following sections.

[2] As to preferential debts the supreme court of Georgia has said: "Such priority rests entirely upon a supposed superior equity;" that it was doubtful the principle could be enforced under the laws of that state; that the doctrine is "court-made law" and "well calculated to destroy all evidence in the sacredness of contracts, to cause those who have parted with their money upon the faith of recognized liens to look with distrust upon the law and to doubt the protection of the courts. It seems to rest upon no firmer basis than the power of courts of last resort to violate the integrity of contracts, which power is to be exercised according to individual opinion of the particular chancellor within whose jurisdiction the given case may happen to fall." Central Trust Co. v. Thurman, 94 Ga. 735.

This criticism of the doctrine is not well founded and weighs but little compared with the current of authorities.

[3] Central Trust Co. v. Thurman, 94 Ga. 735; s. c. 20 S. E. R. 141; Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & North Western Railroad Co. 53 Fed. R. 182. See note to this case by Morris M. Cohn.

[4] Farmers' Loan & Trust Co. v. Detroit, Bay City & Alpena Railroad Co. 71 Fed. R. 29; Wood v. New York & New England Railroad Co. 70 Fed. R. 741; Central Trust Co. v. East Tennessee, Virginia & Georgia Railroad Co. 30 Fed. R. 895; Bound v. South Carolina Railway Co. 47 Fed. R. 30; Clyde v. Richmond & Danville Railroad Co. 56

juries[1] and salaries due officers of the company[2] are not generally considered as preferred debts.[3] The reason for excluding the latter is said to be founded on the proposition that the officers of the company are supposed and presumed to know of its condition, while it is otherwise with laborers and material-men.

Debts incurred in originally constructing the road have been declared not to be entitled to preference.[4]

The doctrine of preferential debts is applicable only when the mortgagees seek and are granted the appointment of a receiver; and are, consequently, parties to the proceeding.[5]

That the doctrine of preferential debts may be applied and enforced in receivership proceedings against railroad companies to foreclose mortgages is now firmly imbedded in American jurisprudence and is founded on the plainest principles of equity and justice.

It is difficult to determine what debts are privileged and to be preferred to the mortgage, and the decisions are also in conflict as to the time such debts must have accrued to entitle them to prior payment.

In many of the federal judicial districts difficulty in determining just what debts are to be preferred has been avoided by requiring, as a condition to granting the application for a receiver, the payment of debts designated and named in the order of appointment. This practice is generally recognized as proper, and has been expressly approved by the supreme court of the United States.[6]

Fed. R. 539; Litzenberger v. Jarvis-Conklin Trust Co. 8 Utah, 15; Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434; Clark v. Central Railroad & Banking Co. (U. S. C. C. A.) 66 Fed. R. 803.

[1] Farmers' Loan & Trust Co. v. Detroit, Bay City & Alpena Railroad Co. 71 Fed. R. 29; Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 68 Fed. R. 36.

As to claim for counsel fees see Bayliss v. Lafayette, M. & B. Railroad Co. 9 Biss. 90.

[2] Addison v. Lewis, 75 Va. 701; National Bank of Augusta v. Carolina, Knoxville & Western Railroad Co. 63 Fed. R. 25. Here of president of company. But in Central Trust Co. v. Chattanooga Southern Railroad Co. 69 Fed. R. 295, it was held that salary due the secretary may be established as a preferred claim, but to entitle it to preference there must have been an order of court at the time of the appointment providing for its payment, based on evidence that the current earnings were diverted to paying interest on the bonded debt.

[3] As to personal injuries see further on in this section.

[4] Porter v. Pittsburg Bessemer Steel Co. 120 U. S. 649.

[5] Clyde v. Richmond & Danville Railroad Co. 56 Fed. R. 539; Central Trust Co. v. East Tennessee, Virginia & Georgia Railroad Co. 130 Fed. R. 895; Bound v. South Carolina Railway Co. 47 Fed. R. 30.

[6] Fosdick v. Schall, 99 U. S. 235; Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R. 551;

Judge Caldwell, of the eighth federal judicial circuit, who has aggressively asserted and rigidly protected the rights of the small debtor class in as many, if not more, railroad receivership cases, than have been submitted to any other one judge, long since adopted the practice of conditional appointment of receivers.[1] Concerning the subject he has said: "The court appointing a receiver may impose such conditions as appear to be just and equitable; and the party asking for and accepting the appointment of a receiver on the condition imposed, will be bound thereby."[2] In another case he further said: "When a receiver is appointed for a railroad, the better practice is for the judge or court making the appointment to stipulate at the time, and as a condition of the appointment of the receiver, what debts and liabilities of the railway company shall be made a charge on the property and paid by the receiver. If the mortgagee is unwilling to take a receiver on the terms imposed, the foreclosure can proceed without a receivership. If no order is made when the receiver is appointed, it may be made afterwards."[3]

The supreme court of the United States used this strong language in declaring the power of courts to impose conditions in appointing a receiver: "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favor he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity."[4]

In appointing receivers upon conditions the conditions imposed by some courts have included more than strictly preferential debts. In the order have been included debts and claims for ticket and freight balances, for damages resulting from negligence in transporting freight and passengers, and for injuries to employees or other

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Dow v. Memphis & Little Rock Railroad Co. 20 Fed. R. 260; Thomas v. Peoria & Rock Island Railroad Co. 36 Fed. R. 808; Giles v. Stanton, 86 Tex. 620; Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad, 53 Fed. R. 182; Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 71 Fed. R. 245.

[1] Every one investigating the law of railway receiverships should read the address of Judge Caldwell delivered before "The Greenleaf Law Club," St. Louis, February, 1896. It is published in full in 30 Am. Law Review, 161.

[2] Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad Co. 53 Fed. R. 182.

[3] Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R. 551.

[4] Fosdick v. Schall, 99 U. S. 235.

persons and to property generally, "which have accrued, or upon which suit has been brought or was pending or judgment rendered in this State;" and "all liabilities of said company to persons or corporations who may have become sureties for said company on stay or *supersedeas* bonds or cost bonds, or bonds in garnishment, or other like proceedings."[1]

Upon the subject of preferential debts the case of Kneeland v. American Loan & Trust Company[2] is of special importance. The opinion was prepared by Mr. Justice Brewer who had, at the time it was rendered, but recently been promoted from the circuit bench, where his experience in receiverships of railways was very great. It is well known by members of the profession in the eighth federal judicial circuit that the views of Mr. Justice Brewer, when circuit judge, and Judge Caldwell were not in accord, upon the question of preferential debts and the imposition of conditions in appointing receivers of railways; those of the former being more restricted and less aggressive. The sentence in the quotation from the Kneeland case given below, "Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage lien sought to be enforced," is understood by members of the profession to have direct reference to some orders made by Judge Caldwell, and especially the one in the case of Central Trust Company v. St. Louis, Arkansas & Texas Railway Company,[3] in which Judge Brewer appointed a receiver and imposed terms requiring the payment of preferential debts, which order was afterward changed by Judge Caldwell, then district judge, to include a much larger class of indebtedness.

In the Kneeland case,[4] Mr. Justice Brewer, speaking for the court, said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specific and limited cases this court has decided that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquired power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden

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[1] Entered by Judge Caldwell in Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R. 551; Dow v. Memphis & Little Rock Railroad Co. 20 Fed. R. 260.

[2] 136 U. S. 89.

[3] 41 Fed. R. 551.

[4] Kneeland v. American Loan & Trust Co. 136 U. S. 89.

the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly defeats the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell the railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage lien. It is the exception and not the rule that such priority of lien can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable power, has unlimited discretion in this matter of the displacement of vested liens."

This announcement of the supreme court may be taken as notice to the circuit courts that the requirement in orders appointing receivers to pay any obligation of the company not strictly included in the term "preferential debts" will not be sanctioned and upheld.

It has been held that the terms imposed in appointing a receiver of a railway should not include the payment of claims for personal injuries.[1] As to whether such claims are preferential debts is in dispute. Such claims have been declared not to be included in the term,[2] while the contrary has been asserted.[3]

Upon this subject the conflicting opinions entertained and expressed by Jenkins, C. J., of the seventh federal judicial circuit, and Hanford, D. J., of the Washington district, in a claim against the Northern Pacific Railway Company are interesting.

[1] Giles v. Stanton, 86 Tex. 620.

[2] Central Trust Co. v. East Tennessee, Virginia & Georgia Railway Co. 69 Fed. R. 658; Farmers' Loan & Trust Co. v. Detroit, Bay City & Alpena Railroad Co. 71 Fed. R. 29; Central Trust Co. v. East Tennessee, Virginia & Georgia Railroad Co. 30 Fed. R. 895; Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 68 Fed. R. 36.

[3] Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 71 Fed. R. 245.

In 1887 one O'Brien recovered judgment against the Northern Pacific Railroad Company in the district court for the fourth judicial district of the then territory, now State of Washington, for $6,000. The company sued out a writ of error in the territorial supreme court to review the judgment, and thereupon executed a *supersedeas* bond with sureties. The judgment was affirmed. Then the company caused a writ of error to be issued out of the supreme court of the United States directed to the supreme court of Washington Territory, and another *supersedeas* bond was thereupon given with certain other persons as sureties. This writ of error was dismissed in November, 1894. The company was placed in the possession of receivers in August, 1894, who petitioned the court for authority to pay the judgment out of the funds in their hands accruing from the operation of the road since the receivership, alleging that the owner of the judgment was about to institute suit against the sureties on the *supersedeas* bonds. The receivers advised the court that the sureties became bound solely as a matter of accommodation and convenience to the company, and without pecuniary advantage of any kind to themselves. They also asserted that, by reason of the *supersedeas* bonds "the assets of the Northern Pacific Railroad Company which came into the hands of your petitioners as receivers have been preserved, and were increased by the amount of such judgment, which would have been collected out of the assets of said company, if said *supersedeas* bonds had not been given." The complainant trust company, which was trustee under all the mortgages sought to be foreclosed, answered that, because of the peculiar hardships of the case, and the fact that if the judgment had been paid without suing out the writ of error the assets of the company would have been decreased to the amount of the judgment, it would consent to its payment. But the representative of the second mortgage bondholders, who had been made a party to the suit, opposed the petition of the receivers.

In an opinion evidencing great thought and research Judge Jenkins denied the petition, asserting that the proposition presented was whether "general creditors are in law and in equity to be preferred to mortgage creditors," and saying: "I am not aware of any decision going quite so far, although it must be confessed that in the case of Farmers' Loan and Trust Company v. Kansas City, Wyandotte and Northwestern Railroad[1] is a dangerous approximation to such holding. I think that case to be in direct antago-

[1] 58 Fed. R. 182.

nism to the rulings of the supreme court, and I am not able to follow it."[1]

Afterward the sureties themselves intervened by petition in the federal circuit court for Washington, where ancillary proceedings were pending. Judge Hanford in a strong opinion sustained the petition, and ordered the receiver to pay the O'Brien judgment and costs in full.

In reference to the opinion of Judge Caldwell in the case of Farmers' Loan and Trust Company v. Kansas City, Wyandotte and Northwestern Railroad Company,[2] which Judge Jenkins criticised, Judge Hanford said: "It is my opinion that Judge Caldwell's decision in that case is sound, and that the principles therein enunciated must prevail as the law of this country." He declared that liabilities for torts are operating expenses because they are a consequence of operation of the road, and that there "can be no reason or just ground for discriminating by allowing one class of current expenses, as, for instance, wages or money due to connecting lines for interchange of traffic, to be paid, and refusing payment for any other expense unavoidably incurred in the operation of the railroad, as, for instance, a judgment for a personal injury to a passenger or employe, or other damage to merchandise in transit."[3]

The assertion of Judge Hanford is well founded, and is too strong to be lightly disregarded. It has direct support in the opinion of the federal supreme court in the case of Union Trust Company v. Morrison,[4] in which the same question was involved, the sureties having signed an injunction bond in a proceeding to enjoin the enforcement of a judgment against the company.

The writer is inclined to the opinion that the decisions of the United States supreme court to this time tend strongly against classing a claim for personal injury against the railroad company as a preferential debt. Mr. Justice Brewer's views when on the circuit bench were certainly unfavorable to such practice, and they are strongly expressed adversely in the Kneeland case.[5]

The federal judiciary is greatly divided as to the question of preferential debts. In the Northern Pacific Railroad receivership litigation the Wisconsin creditors of the company, because of the rulings of Judge Jenkins, were denied payment of claims of the

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[1] Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 68 Fed. R. 86.

[2] 53 Fed. R. 182.

[3] Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 71 Fed. R. 245.

[4] 125 U. S. 591.

[5] Kneeland v. American Loan & Trust Co. 136 U. S. 89.

same character which were declared privileged and preferred in Minnesota and Washington; the order in the ancillary suit in Minnesota having been rendered by Judge Caldwell and followed by Judge Hanford in the ancillary proceedings pending in Washington.

It is worthy of note that when the proposed purchasers of the Northern Pacific Railroad at the foreclosure sale petitioned Congress for a federal charter, the House Judiciary Committee inserted in the draft presented the broad order of Judge Caldwell requiring the payment of the company's debts and liabilities; and the bill, with this addition, passed the House of Representatives.

In the case of Thomas v. Western Car Company [1] the federal supreme court said that while "many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for a receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the *corpus* of the property," [2] yet the discretion to do so should be exercised with very great care. The court declared that rental for cars accruing prior to the commencement of the foreclosure proceedings should not be paid in preference to the mortgage.

In the case of Wood v. New York and New England Railroad Company [3] these propositions were announced as to what are preferential debts: No fixed and inflexible rule can be framed, but each case is to be largely governed by its own special circumstances; that the tendency of the courts is to narrow rather than enlarge the class of such preferred claims; that the allowance of such claims does not depend upon the order of court appointing the receivers; that the current income of a railroad is primarily to be devoted to the payment of current debts; and where such income has been used for the payment of interest upon mortgage indebtedness or for permanent improvements, or in any manner has been diverted for the benefit of the mortgagees at the expense of the current debt fund, there must be a restoration to the extent of such diversion; that independently of the question of diversion debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road.

A claim for the erection of a station depot has been held to be a preferred debt, the court saying that such a building is essential to

[1] 149 U. S. 95.

[2] From opinion in Miltenberger v. Logansport Railway Co. 106 U. S. 286.

[3] 70 Fed. R. 741.

the operation of the road.[1] But rentals which accrued under a lease of a railroad line have been declared not entitled to preference.[2] So of a claim for goods lost by fire while in the possession of the company.[3]

The doctrine of preferential debts is not applicable to strictly private corporations, but only to those of a *quasi* public character; those in the operation of which the public is peculiarly interested; which of course, includes railroads.[4]

Section 392. **The Time Within Which Preferential Debts Must Have Accrued.** — The decisions are conflicting as to the time within which preferential claims must have accrued to entitle them to preferred payment. This question may be properly presented by reference to the cases concerning it.

Six months have been frequently asserted to be the fixed time prior to the appointment of a receiver of the company which bars the payment of preferential debts. The case of Fosdick v. Schall[5] has been accepted in some jurisdictions as establishing what is called the "six months' rule."[6] Even this rule has been declared to be "dangerous" and it has been asserted, but very incorrectly, that claims older than six months are never preferred.[7]

There are authorities which declare against six months or any fixed time as barring the allowance of preferred claims. "A preferential debt," it has been asserted, "is not barred though contracted more than six months before the appointment of a receiver. As to such debts there is no arbitrary six-months rule, as has been often decided."[8]

The same announcement was made in another federal circuit, with the additional statement that the debt "must have been incurred within a reasonable time before the appointment of receivers; such reasonable time depending on the circumstances of each particular

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[1] Northern Pacific Railroad Co. v Lamont, 69 Fed. R. 23.

[2] New York, Pennsylvania & Ohio Railroad Company v. New York, Lake Erie & Western Railroad Co. 58 Fed. R. 268.

[3] Easton v. Houston & Texas Central Railway Co. 38 Fed. R. 12.

[4] Merchants' Company v. Moore (Ala.) 17 So. R. 705; Phillips v. Wise (Tex. Civ. App.), 31 S. W. R. 428; Fidelity Insurance & Safe Deposit Company v. Shenandoah Iron Co. 42 Fed. R. 372.

[5] 99 U. S. 235.

[6] Putnam v. Jacksonville, Louisville & St. Louis Railway Co. 61 Fed. R. 440; National Bank of Augusta v. Carolina, Knoxville & Western Railroad Co. 68 Fed. R. 25; Fosdick v. Schall, 99 U. S. 235.

[7] National Bank of Augusta v. Carolina, Knoxville & Western Railroad Co. 68 Fed. R. 25.

[8] Northern Pacific Railroad Co. v. Lamont, 69 Fed. R. 23.

case."[1] In another case the time was stated to be "a reasonable time — put usually at six months."[2]

Judge Caldwell has said and still insists that "there is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver," and that there is no "six months rule."[3] The United States supreme court gave priority to a claim for materials furnished three years before the appointment of the receiver, and for which a note had been given sixteen months before the appointment.[4] And in another case the same court recognized the justness of paying a debt contracted for coal eleven months preceding the appointment of the receiver.[5]

In the case of the Central Trust Company v. St. Louis, Arkansas & Texas Railway Company,[6] Mr. Justice Brewer, then circuit judge, appointed a receiver and provided in the order for the pay ment of enumerated indebtedness which had been incurred by the company within six months. Afterward Judge Caldwell, then district judge, entered a second order, which included a larger class of indebtedness and contained no specification of time,

The author is not prepared to accept the so-called "six months rule," or any arbitrary or fixed time, within which preferential debts must have been contracted to entitle them to payment out of the trust estate. If the doctrine of preferential debts is to prevail at all, it should be enforced so as to fully administer the justice with which it is fraught. Why there are right and equity in favor of a creditor for six months and not for seven, twelve or a greater number of months is beyond our understanding. Just as long as the debt may be, or could have been, enforced against the company, it should be considered as retaining its preferential character and entitled to the privilege of preferential debts. Such time is that prescribed by the statute of limitations, which alone should, and reasonably can bar preferential debts. This assertion is but the announcement of the maxim, equity follows the law.

Section 393. **Of Claims Arising Out of Operation of Road by Receiver Entitled to Prior Payment.**—As stated in the second preceding section the term "preferential debts" is used to desig-

[1] Wood v. New York & New England Railroad Co. 70 Fed. R. 741.

[2] Clyde v. Richmond & Danville Railroad Co. 56 Fed. R. 539.

[3] Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & Northwestern Railroad, 58 Fed. R. 182. See note to this case by Morris M. Cohn. See article by Judge Caldwell upon "Receivers of Railways," 30 Am. L. Rev. 161.

[4] Hale v. Frost, 99 U. S. 389.

[5] Burnham v. Bowen, 111 U. S. 776.

[6] 41 Fed. R. 551.

nate certain indebtedness incurred by the company before the appointment of the receiver, while the term "prior claims" may be properly used to signify indebtedness and liability contracted and incurred by the receiver in operating the road. In this section we wish to speak of the latter class of indebtedness as distinguished from preferential debts, of which the preceding section treats.

It has been declared that, to entitle one to priority over the mortgage it must be shown that the fund from which he was entitled to payment was diverted and misappropriated for the use and benefit of mortgage bondholders.[1] In the case of Thomas v. Peoria & Rock Island Railway Company,[2] Mr. Justice Harlan said: "Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income."

The claims arising out of the operation of a railroad by a receiver, whether under contract or tort, have right to payment out of the earnings received from the operation of the road superior to the lien of the mortgage. If they be insufficient, the claims are chargeable on the *corpus* of the property, and entitled to payment out of the proceeds of its sale.[3]

Where a receiver of a main line and a branch line incurs expense for the betterment of the latter, such expense becomes a charge on the fund of the entire road and is entitled to payment prior to the mortgage.[4]

All expenses incurred in operating the road and administering the trust are to be paid out of the earnings; and if they be insufficient then out of the proceeds of the sale of the property.[5]

A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in the discharge of these obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may have invoked the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation

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[1] St. Louis, Alton & Terre Haute Railroad Co. v. Cleveland, Cincinnati & Indianapolis Railway Co. 125 U. S. 658.

[2] 36 Fed. R. 808.

[3] Central Trust Co. v. Thurman, 94 Ga. 735; Kneeland v. Bass Foundry & Machine Works, 140 U. S. 592.

[4] Phinizy v. Augusta & Knoxville Railroad Co. 62 Fed. R. 771.

[5] See section 400.

to the public of continued operation, it, in the administration of such receivership, may rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself.

Section 394. **Of Claims for Damages to Property or Injuries to Persons.**— We shall see hereafter, when discussing suits against receivers, that the same liability for losses, delays, etc., attaches to receivers as would attach to the railway companies whose property they hold. It has been decided by the supreme court of the United States that damages for goods lost and for property injured in transportation over a road which is being operated and managed by a receiver, constitute a proper charge upon the earnings of the road in preference to the claims of bondholders.[1] In the same way it has been held that passengers over a railroad and an employe of the company, when entitled to damages for injuries received while the road is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time the action was brought.[2] This subject will receive fuller treatment in the chapter upon suits against receivers.

Section 395. **Of Rentals of Leased Lines—Car-Trust Leases—Rolling Stock, etc.**— It is settled that the receiver may be ordered to pay out of the income, and as one of the expenses of operating the road, the rentals due for a line leased by the company whose property he has in his possession and which he is authorized to operate;[3] and if a receiver uses such a leased line with the full knowledge and consent of the bondholders, the payment of a fair rental for the use of such line and also payment for supplies and materials used in its operation may be enforced out of the proceeds of foreclosure, before distribution among the bondholders.[4] In the same manner when the company has possession of rolling stock under a conditional sale, the title not vesting in the company until it has made all the stipulated payments — commonly called car-trust leases[5]— the vendor's title and lien will not be affected by

[1] Cowdrey v. Galveston, H. & H. R. R. Co. 93 U. S. 352.

[2] *Ex parte* Brown, 15 S. C. 518. See section 394.

[3] Woodruff v. Erie Ry. Co. 93 N. Y. 609.

[4] Miltenberger v. Logansport R. R. Co. 106 U. S. 286.

[5] See the paper on "Car-Trust Securities," by Francis Rawle, Esq., of the Philadelphia bar, read before the American Bar Association, at Saratoga, in 1885.

the appointment of a receiver, who can acquire no greater title to the particular property than was owned by the company itself. The remaining payments, in case the rolling stock is used by the receiver and not surrendered to the vendor, or a reasonable compensation for its use, may be ordered to be paid out of the receiver's earnings.[1] The orders giving priority to such claims have, in some cases, directed that, in case of deficiency in the net earnings account, they be paid out of the proceeds of the sale under foreclosure.[2] In New Jersey it has been held that the lessors in car-trust leases were not entitled to payment in full of the rent reserved in the lease, at the hands of the receivers, unless the court should find that such payment was for the best interests of the trust.[3] If rolling stock thus held by the receiver and used by him is sold under the decree of foreclosure the owner will be entitled to payment out of the proceeds of the sale.[4] One who purchases at the foreclosure sale rolling stock which had been bought by the receiver with the earnings of the road, is entitled to it as against mortagees claiming under a mortgage which was to cover after acquired property.[5] If a receiver's income is sufficient to pay for additional rolling stock necessary to the operation of the road, he will not be permitted to create a car-trust to procure it for the purpose of enabling him to apply the current income to interest upon bonded indebtedness.[6]

Section 396. **Liens Given by Statute will be Protected—Equitable Liens.**—Where a statute gives a lien upon railway property to creditors who furnish labor or supplies, such lien will not be affected by the appointment of a receiver in a proceeding by bondholders for foreclosure. So where a statute conferred the right to attach rolling stock and other personal property of a railroad company, and subjected the rights of mortgage creditors to those of the attaching creditors, it was held that the creditors entitled to the attachment might pursue their remedy, and if it proved insufficient to pay their claims they would be preferred over mortgage

[1] Fosdick v. Schall, 99 U. S. 235; Myer v. Car Co. 102 U. S. 1; Coe v. New Jersey Midland R. R. Co. 27 N. J. Eq. 37.

[2] Miltenberger v. Logansport R. R. Co. 106 U. S. 286. In Fosdick v. Schall, 99 U. S. 235, it was said, in effect, that whether such an order should be made would depend largely upon whether there has been a diversion of the receiver's income from his expenses.

[3] Coe v. New Jersey Midland R. R. Co. 27 N. J. Eq. 37.

[4] Fosdick v. Car Co. 99 U. S. 256.

[5] Strang v. Montgomery & E. R. R. Co. 3 Woods, 613.

[6] Taylor v. P. & R. R. R. Co. 9 Fed. Rep. 1. See section 395.

creditors for payment out of the net income.[1] Creditors entitled to statutory liens under the laws of a state may present their claims and have their liens enforced in a federal court, whose receiver is in possession of the property, with the same effect as if they proceeded in the courts of the state; and creditors whose demands arose in another state, and which constitute equitable liens against the property, may proceed in the same way.[2] When, however, conflicting liens are asserted by different parties, those claiming equitable liens should not be heard before the final hearing.[3]

Section 397. **Of the Liens of Judgment Creditors.**—If creditors having judgments are entitled to be paid out of the funds of the railroad, or out of claims due to it, they may be paid in full out of the receiver's income in preference to mortgage bondholders, if such funds and debts have been appropriated by the receiver.[4] But when the judgment is obtained against the receiver for materials furnished during the receivership, or if the cause of action arose out of his acts in operating and managing the road, the court may order it to be paid out of the earnings, or, if necessary, out of the proceeds of the foreclosure, since the right to priority depends not so much upon the fact that judgment has been obtained as upon the character of the claim.[5] It has been held that a person who has recovered judgment against the receivers of a railroad for injuries received by him while traveling as a passenger upon the road, is not entitled to payment out of the earnings of the road in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers;[6] but such a judgment may be paid out of the net income in preference to claims of bondholders upon such income.[7]

Section 398. **Cases in which Priority has been Refused.**—Courts have refused to grant priority of payment to persons having claims for money loaned to a railroad company, contractors' claims for construction[8] and for advances made to complete the construction of a road when such advances were not made at the request of

[1] Poland v. Lamoille Valley R. R. Co. 52 Vt. 144.

[2] Blair v. St. Louis, H. & K. R. R. Co. 19 Fed. Rep. 861.

[3] Receivers, etc., v. Wortendyke, 27 N. J. Eq. 658. See section 356. *supra.*

[4] Gilbert v. Washington City, Virginia Midland & G. S. R. R. Co. 33 Gratt. 645.

[5] Turner v. Indianapolis, B. & W. R. R. Co. 8 Biss. 527.

[6] Davenport v. Receivers A. & C. R. R. Co. 2 Woods, 519. See also Hopkins v. Connel, 2 Tenn. Ch. 323. See fully upon this subject section 391.

[7] *Ex parte* Brown, 15 S. C. 518; Klein v. Jewett, 26 N. J. Eq. 474.

[8] Addison v. Lewis, 75 Va. 701.

bondholders or upon their promise.[1] It has also been held that damages caused by fire ignited by sparks from a locomotive, are not included within the operating expenses which have been allowed priority of payment.[2]

Section 399. **Preferred Claims are to be Paid Primarily Out of the Earnings.**—It is fairly to be inferred that a mortgagee in taking his security upon railroad property, tacitly agrees that the cost of carrying on the business of the road is to be paid out of its earnings, notwithstanding the lien of his mortgage. When, therefore, a court of equity directs that the current expenses of operating the road shall be paid by its receiver out of the earnings, the security is, as to that account, unaffected.[3] So it has been held that the proceeds and profits of the business in the hands of the receiver are subject, first, to the charges of administration and management, and then to the liens and trust in behalf of which the receiver was appointed, and that neither the railroad company itself, nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied.[4]

It has been distinctly held by the supreme court of the United States that "the net earnings of the road while in possession of the court, and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such be found to exist."[5] And, in a later case, the same high authority pronounced what may be considered the rule as to the liability of the income of property in the hands of a railway receiver for necessary expenses, as follows: "When a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company

[1] *In re* Kelly, 5 Fed. R. 846; s. c. 10 Biss. 151.

[2] Hiles v. Case, 14 Fed. Rep. 141.

[3] Fosdick v. Schall, 99 U. S. 235. See also Gilman v. Illinois & M. Tel. Co. 91 U. S. 603; American Bridge Co. v. Heidelbach, 94 U. S. 798; Galveston R. R. Co. v. Cowdrey, 11 Wall. 459. In Fosdick v. Schall, *supra*, Waite, Ch. J., said that the income out of which the mortgagee is entitled to be paid, while out of possession, "is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments and useful improvements." As to whether interest should be allowed upon claims which have been given priority over mortgage indebtedness, etc., see *Ex parte* Brown, 18 S. C. 87.

[4] Schutte v. Florida R. R. Co. 8 Woods. 692, 712.

[5] Hale v. Frost, 99 U. S. 389.

would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income, before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it."[1]

Section 400. **If the Income be Insufficient, the Court May Order Claims to be Paid Out of the Corpus.**— If, however, there is no income fund to be found, after scrutiny and an opportunity has been given opposing interests to be heard, priority for necessary expenses of managing the trust may be allowed out of the *corpus* of the property without the consent of the bondholders secured by mortgage upon it.[2] But in order to make the *corpus* liable for such debts in preference to bondholders, the priority must be specially authorized by the court. An order simply authorizing him to pay operating expenses out of the income is plainly insufficient.[3] The receiver himself cannot charge the *corpus* of the mortgaged property with the payment of any debts he may make. He is closely restricted to the income and profits of the road which he operates and manages.[4] The extent to which this power of encroachment upon the *corpus* may be exercised by the court has not been determined. It has been resorted to in order to enable a receiver "to raise money necessary for the preservation and management of the property;"[5] to build bridges,[6] and to complete the building of an unfinished road.[7] So, also, wages due employes at the time the receiver took possession, have been directed to be paid out of the earnings, or out of the trust property.[8] Priority for claims on account of current expenses will

[1] Burnham v. Bowen, 111 U. S. 776, 780 (Waite, C. J.).

[2] Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S, 434 (1885).

[3] Hand v. Savannah & C. R. R. Co. 17 S. C. 219; Blair v. St. Louis, H. & K. R. R. Co. 22 Fed. R. 471.

[4] Hand v. Savannah & C. R. R. Co. 17 S. C. 219; Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500.

[5] Wallace v. Loomis, 97 U. S. 146.

[6] Miltenberger v. Logansport R. R. Co. 106 U. S. 286.

[7] Kennedy v. St. Paul & Pacific R. R. Co. 2 Dill. 448; s. c. 5 Dill. 519.

[8] Duncan v. Trustees of Chesapeake, etc. R. R. Co. 9 Am. Ry. Rep. 886; Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434 (1885). But see, particularly, Metropolitan Trust Co. v. Tonawanda Valley, etc. R. R. Co. 103 N. Y. 245 (1886), an important decision.

not be allowed unless special equities are shown entitling the claimants to priority over the mortgage indebtedness.[1]

It has been held that a claim for rent of cars used by the receiver would not be made a lien on the *corpus* of the estate.[2]

The income is chargeable before the *corpus;* but as a last resort the charge would fall on the latter.[3]

Where the receivers were held liable for the coal in the bins at the time of their appointment, it having been used in operating the road, it was held the debt was entitled to payment out of the *corpus* of the property, should the earnings in the hands of the receivers be insufficient to pay it, and the same was said of a debt for coal sold to the receivers.[4]

When a receiver uses a leased line of railway the rentals are entitled to payment before the mortgage debt.[5]

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[1] Blair v. St. Louis, H. & K. R. R. Co. 22 Fed. R. 471.

[2] Huidekoper v. Locomotive Works, 99 U. S. 258.

[3] Central Trust Co. v. Thurman, 94 Ga. 735.

[4] Clark v. Central Railroad & Banking Co. (U. S. C. C. App.) 66 Fed. R. 803.

[5] Kneeland v. American Loan & Trust Co. 136 U. S. 89. In this case, on application of judgment creditor, a receiver was appointed and operated the leased road for four months. Afterward the mortgagee brought proceedings in which a receiver was appointed, and the question was whether the rentals for said four months were properly allowed as liens over the mortgage. Held not, and the case was reversed with instructions to strike out all allowances for rentals prior to the appointment of the receiver at the instance of the mortgagee, and to allow the rentals as fixed for the time subsequent thereto. Brewer, J., said: "When the holder of a first lien on the realty of a road asks a court of chancery to take possession, not only of the real but also of personal property used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the real shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the obligation for the use of the personalty shall be paid in preference to his lien; but it certainly is a consent that the rental value of that personalty, during the time of the possession of the receiver appointed at his instance, may have priority of his claim. If the holder of a lease upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But either because he believed that the possession of the personalty was necessary for the operation of the road, and the security of his claim; or else because, by virtue of his secondary right, he expected to pay for the personalty and retain both the personalty and the realty, he has had the court take possession of both by its receiver, and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rentals pending the receiver's possession. The conclusion is irresistible, that under the circumstances reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness."

Section 401. **Of Diversion of Income as Affecting Priority.**— The income from operating the road being thus primarily liable for the necessary expenses incurred by the receiver in the management, the diversion of such income from the payment of such expenses for other purposes will not be allowed. So the appropriation of the income for the benefit of the mortgage bondholders, either in the payment of interest on their bonds or for permanent improvements upon the property, will not be permitted when debts for supplies, materials and labor remain unpaid; in such case the court will restore to the unsecured creditors what has been improperly diverted.[1] It is not necessary that the diversion of income be made before the receiver was appointed. Thus where, while a road was in the hands of a receiver, the income derived from its operation was applied in payment for additional grounds and rolling stock which enhanced the value of the property as a security, and thus benefited the mortgagees, debts for supplies furnished were made a charge upon the property after it had been sold under foreclosure, and it was said that such property could be sold to satisfy the charge.[2]

The diversion of the earnings and their investment in betterments has been declared sufficient reason to order a claim for personal injury to be paid out of the proceeds of the foreclosure sale.[3]

[1] Fosdick v. Schall, 99 U. S. 235; Williamson's Adm'r v. Washington City, Virginia Midland & G. S. R. R. Co. 33 Gratt. 624; Burnham v. Bowen, 111 U. S. 776; Turner v. Indianapolis, B. & W. R. Co. 8 Biss. 315; Ryan v. Hays, 62 Texas, 42.

[2] Union Trust Co. v. Soutter, 107 U. S. 591. See also Burnham v. Bowen, 111 U. S. 776, 782, in which Chief Justice Waite said: "As the diversion of the fund created in equity a charge on the property as security for its restoration, it is clear that if the mortgagees prefer to take the property under a decree of strict foreclosure, they take it subject to the charge in favor of the current creditor whose money they have got, and that he can insist on a sale of the property for his benefit, if they fail to make the payment without." In Langdon v. Vermont & Canada R. R. Co. 54 Vt. 593, debts incurred by managers of a railway, after their discharge as receivers, under a consent decree, were held to constitute a lien in the nature of an equitable mortgage, which may be enforced by strict foreclosure.

[3] Ryan v. Hays, 62 Tex. 42.

CHAPTER XIII.

RECEIVERS' CERTIFICATES.

Section 402. Of Receivers' Certificates Generally — Validity, Definition, Origin and Nature of.
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419. Application of Doctrine to Strictly Private Corporations — Taxes and Operating Expenses.

Section 402. **Of Receivers' Certificates Generally — Validity, Definition, Origin and Nature of.** — When a receiver of the property of a railroad company has been appointed, pending the foreclosure of a mortgage upon the road, it sometimes may occur that, in order to the proper preservation of the property, and the regular and efficient management of the trust while in the receiver's hands, it is necessary for him to use money beyond the current income. In such a case, upon a proper application, it is usual for the court to authorize him to borrow money upon the credit of the property. The negotiation of these loans has given rise, within recent years, to a comparatively new form of security, known as a receiver's certificate. This may be defined to be a non-negotiable evidence of

debt, or debenture, issued by authority of a court of chancery, as a first lien upon the property of a debtor corporation in the hands of a receiver.

Within the past twelve or fifteen years these certificates, to the amount of many millions of dollars, have been issued, and the courts are constantly authorizing the further issue of them, ostensibly for the preservation of the property and in the interest of the bondholders,[1] but, it is believed, in a majority of the cases in which they are issued, to the hindrance and delay of a prompt foreclosure, to the impairment of the bondholders' security, and to the scandal of the courts.

The doctrine on which receivers' certificates are founded is of recent origin, and its first complete and emphatic enforcement was by the supreme court of Alabama in the case of Meyer v. Johnston.[2] It is founded on the same equitable principles which justify and support the payment of prior and preferential debts as set forth in the preceding chapter.[3] In fact the power to issue receivers' certificates merely enables the court to preserve and protect the trust property when the funds in the receiver's possession are insufficient to do so, which, if there were sufficient funds on hand could be done by the court without such action.

In authorizing the issuance of such certificates the court exercises the same power which it possesses to order the payment of debts incurred in operating and preserving the trust property. It has its foundation and justification in the principle that when property of a *quasi* public corporation is placed in the custody and control of a court of equity it will be operated and preserved as may be necessary to protect the interests of all parties concerned and serve public convenience. It is the outgrowth of the necessity of keeping such corporations in active operation.[4] The consideration to the mortgagees is the increased value of the property.

Although the doctrine of receivers' certificates has been assailed and criticised; although it is on the verge, if not within the line of

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[1] In speaking of the exercise of the power to issue these certificates Mr. Jones, in his learned work upon Railroad Securities, says: "This authority of the courts when properly exercised is highly beneficial to the mortgage bondholders." Jones' Railroad Securities, page 507.

[2] 58 Ala. 287. The power of a court of equity to empower a receiver to borrow money for the preservation of the railroad property and make the loan a first and prior charge on the property over the debentures is recognized in England. Greenwood v. Algesiras Railroad Co. 2 Ch., 1894, 205.

[3] See sections 391, 393.

[4] Union Trust Co. v. Illinois Midland Railroad Co. 117 U. S. 434.

legislative functions, and is, in effect, the impairment of the obligation of contracts, yet it is firmly imbedded in American jurisprudence and is constantly announced and enforced in state and federal courts.[1] But a court of one state cannot, it has been held, authorize the issuance of receivers' certificates and make them a prior lien on property in another state.[2]

When a receiver issues certificates the transaction is but a loan, evidenced by the certificates. They represent a "call loan," and the taker assumes that proper notice will be given when they are to be paid.[3] The certificates are merely evidence of indebtedness, and have no higher character than the debts for which they are issued and represent.[4] "The holders of receivers' certificates depend for their ultimate rank upon the final decree in the cause."[5]

Whenever certificates are issued, when the authority is not fraudulently secured, good faith requires the court to keep its promise and redeem them.[6]

The power to authorize receiver's certificates should at all times and under all circumstances be exercised sparingly and with caution.[7] This principle is constantly announced, but frequently

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[1] Kneeland v. Luce, 141 U. S. 491; Investment Co. v. Ohio & Northwestern Railroad Co. 36 Fed. R. 48; Lloyd v. Chesapeake, Ohio & Southwestern Railroad Co. 65 Fed. R. 351.

A receiver was appointed of an iron company, and it was held that the court could authorize him to issue certificates and to make them a lien paramount to the deed of trust. The court said: "It was necessary to raise money in some way to preserve the property from destruction or serious injury, and to put it in saleable condition, and the only practicable mode of accomplishing that object was by issuing receivers' certificates. * * * It is now well settled that a court of equity has the power, in this class of cases, to authorize its receiver to issue certificates upon which to raise money when the necessity of the particular case requires it, and to make them a first lien on the property in his hands; and the authority when properly exercised is highly beneficial to the mortgage bondholders: yet it ought to be cautiously and sparingly exercised." Karn v. Rorer Iron Co. 86 Va. 754.

Where the receiver was in possession of mines and a railroad, but was not operating the latter, he was authorized, with consent of the mortagees to issue certificates, which were declared to constitute a prior lien on the property. Central Trust Co. v. Sheffield & Birmingham Coal, Iron & Railway Co. 44 Fed. R. 526.

[2] Pool v. Farmers' Loan & Trust Co. 7 Tex. Civ. App. 334; s. c. 27 S. W. R. 744.

[3] Mercantile Trust Co. v. Kanawha & Ohio Railway Co. 53 Fed. R. 874.

See article upon Receivers' Certificates by William A. Carr, Esq., 1 Pa. Law Ser. 594 (The Blackstone Publishing Co., Philadelphia).

[4] Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co. 42 Fed. R. 372.

[5] Gordon v. Newman, 10 U. S. C. C. Ap. 587; s. c. 62 Fed. R. 686.

[6] Kneeland v. Luce, 141 U. S. 491.

[7] Investment Co. v. Ohio & Northwestern Railroad Co. 36 Fed. R. 48;

violated. Courts defer much, in fact too much, to the suggestions and opinions of receivers, who, as said by Judge Caldwell, are in too great haste to assure courts that if they had some capital they could accomplish the very things which an effort to attain wrecked the company.[1] To authorize the issuing of certificates there must be a showing of the existence of an extraordinary emergency which calls for extraordinary methods for the preservation of the property.[2]

The purchaser of the certificates is in no way responsible for the honest and proper application of the proceeds. The embezzlement of the funds will not affect the validity and full payment of the certificates.[3] "The principle of law is that, in order to hold the body of the trust liable for the receiver's certificate, the proceeds must come to the hands, custody or control of the receiver."[4]

Receivers' certificates bind no one personally, unless by fraud or some illegal act of the receiver he may become personally obligated for their just payment.[5]

Although a receiver's discretion and general powers in operating a railroad are somewhat unrestricted, yet in so important a matter as incurring a debt by issuing certificates and displacing a prior lien he has no power to act without authority from the court.[6] But in the case cited it was held that, though the certificates were issued without any order of the court directing such action, yet as the money was paid for them in good faith and was applied properly to the preservation and benefit of the trust property, they should be considered valid and be paid. The court said that its ruling must not be taken as a precedent. And where a receiver's agent sold certificates without authority, but the sale was ratified by the receiver, the court will apply and enforce the doctrine of estoppel.[7]

Receivers' certificates do not in any particular affect the rights of lien-holders who are not parties or privies to the receivership proceeding.[8] It is one of the elements supporting the doctrine, and a

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Karn v. Rorer Iron Co. 86 Va. 754; Union Trust Company v. Illinois Midland Railway Co. 117 U. S. 434; Wallace v. Loomis, 97 U. S. 146.

[1] Hanna v. State Trust Co. 70 Fed. R. 2.

[2] Central Trust Co. v. Tappan, 6 N. Y. S. 918.

[3] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 234.

[4] Alabama Iron & Railway Co. v. Anniston Loan & Trust Co. (U. S. C. C. App.) 57 Fed. R. 25.

[5] Wesson v. Chapman, 28 N. Y. S. 431.

[6] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434, 476.

[7] Alabama Iron & Railway Co. v. Anniston Loan & Trust Co. 57 Fed. R. 25.

[8] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434; Meyer v. Johnston, 53 Ala. 237; Snow v. Winslow, 54 Io. 200; Stevens v. Douglas, 57 Hun, 498.

strong reason for the exercise of the power to issue certificates, that those who cause the property to be placed in the custody of the court are to be considered as consenting to whatever may be necessary to preserve and protect it. Certificates given by a receiver after he has been discharged, and which were not authorized by the court, cannot be enforced against the *corpus* of the insolvent. There cannot be equitable relief in such a case unless the holder of the certificates shows that the money paid to the receiver was used for the benefit of the estate. The liability if any is a personal one against the receiver.[1]

Certificates issued by the receiver of the Northern Pacific Railroad Company under order of the federal court in Wisconsin were recognized and enforced by the federal court in Washington, though the latter denied the power of the former court to render orders binding on it in the receivership proceedings.[2]

If a receiver's certificates are void for any reason, they constitute no charge on the trust estate.[3]

Section 403. **Further of the Power of Courts of Chancery to Authorize their Issue — Caution.** — "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund."[4] This is the language of Bradley, J., in delivering the opinion of the supreme court of the United States in the leading case of Wallace v. Loomis, and the rule, as there laid down, is settled law, both in the state and federal courts of this country.[5] "It

[1] Wesson v. Chapman, 28 N. Y. S. 431.

[2] Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 69 Fed. R. 871.

[3] Ludington v. Thompson, 38 N. Y. S. 768.

[4] Wallace v. Loomis, 97 U. S. 146, 163 (1877).

[5] Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434, 458 (1886); Miltenberger v. Logansport Ry. Co. 106 U. S. 286, 309; Meyer v. Johnston, 53 Ala. 348; Hoover v. Montclair & Greenwood Lake R. R. Co. 29 N. J. Eq. 4; Kennedy v. St. Paul & Pacific R. R. Co. 2 Dill. 448; s. c. 5 Id. 519; Bank of Montreal v. Chicago, Clinton & Western R. R. Co. 48 Iowa, 518; Taylor v. Philadelphia & Reading R. R. Co. 7 Fed. Rep. 377; Jerome v. McCarter, 94

seems to be settled that a court of equity has the power, in this class of cases, to authorize its receiver to issue certificates of indebtedness, and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements. * * * But it is a power to be sparingly exercised. It is liable to great abuse, and, while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not unfrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court."[1]

From the foregoing extracts from the opinions of the judges it is clear that the courts of chancery in this country will recognize the receiver's right, in a proper case, to issue these certificates, but that the power is regarded a dangerous one, and one very likely to be abused, and, in consequence, to be exercised sparingly and[2] with scrupulous regard to the rights of the creditors. Otherwise it is merely a license to do mischief.

Section 404. **Further of the Reason for the Exercise of the Power.**—It is a settled rule of law that a mortgagee who takes possession under his mortgage, may expend upon the property such sums as are necessary to preserve it from waste or deterioration, to the end that his security may not depreciate in value. In the same way a receiver of the property of a railway company is justified, upon the general principles of equity jurisprudence, acting in reality on behalf of the mortgagees, in expending upon the property such sums as the mortgagees themselves might expend, to stay waste or destruction. In other words, the bondholders, as mortgagees, have the right to maintain the property in repair until the satisfaction of their claim. Accordingly the court will authorize the receiver to use as much of the current revenues as is necessary to this end. It is his duty, inasmuch as he is operating a railway upon which are devolved, by operation of law, the obligations of a common carrier, to keep the road in a condition suitable and adequate to the safe and rapid transportation of passengers and freight. There is upon this ground a stronger reason for allowing a receiver of property of this sort to expend money upon its maintenance and preservation than exists in favor of such an allowance to any ordinary mortgagee.

U. S. 734; Cowdrey v. Railroad Co. 1 Woods, 331; Stanton v. Alabama, etc. R. R. Co. 2 Id. 506, Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 49 Vt. 792; s. c. 50 Id. 500, 569.

[1] Credit Company (Limited) of London v. Arkansas Central R. R. Co. 15 Fed. Rep. 46, 49; s. c. 23 Am. Law Reg. (N. S.) 35, and see the note thereto by Mr. Adelbert Hamilton, pp. 44–49.

[2] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

This reason is grounded in that rule of public economy which requires the public highways to be kept in repair. The public is entitled to protection in the continued use of the railway as a king's highway. Accordingly, upon this ground, when the current revenues are inadequate, the receiver may borrow money upon the security of the property, for the preservation of it.

"If it were not for the public quality belonging to them," said Manning, J., in Meyer v. Johnston,[1] "for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a chancellor might say to the parties most interested, unless you furnish means for the protection of this property, which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck. But the inconvenience and loss which this would inflict upon the population of large districts, coupled with the benefit to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require, not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one, but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it, that the court should borrow money for that purpose, if it cannot otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued, constituting a first lien on the proceeds of the property and redeemable when it is sold or disposed of by the court."[2]

Section 405. **Of the Necessity of Notice of the Application.**— It is asserted generally that an order for the issue of certificates will be made only after due notice to all the parties in interest and after a full hearing, all parties being represented, as to the necessity or propriety of the expenditure proposed.[3]

A notice to the trustees of the mortgage is, however, notice to the bondholders. The bondholders are represented by the trustees,[4]

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[1] 53 Ala. 237, 348.

[2] In the luminous opinion in this case the whole law of receiver's certificates is canvassed, and in the excellent briefs of counsel, included in the report, there is an exhaustive collection of the authorities down to the year 1875, when the case was reported. No study of the subject can be complete without a careful reading of this case.

[3] *Ex parte* Mitchell, 12 S. C. 83; Meyer v. Johnston, 53 Ala. 237, 349; Wallace v. Loomis, 97 U. S. 146, 163. *Cf.* Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434, 463.

[4] See section 372.

and if the trustees are parties to the foreclosure suit, and had due notice of the application, and made no objection to its being granted, they cannot be heard to claim a want of notice. So far as concerns the power of the court to act in making the order, and so far as the interests of third persons acting upon the faith of it might be affected, the notice to the trustees is notice to all the bondholders.[1]

Want of notice to all parties will not *per se* destroy the validity of the certificates, but the purchaser and his assignees will take them "subject to the final action of the court in regard to the loan."[2] The phrase quoted simply means that if certificates are issued and the money received for them is properly invested for the preservation and operation of the trust property, their payment will be allowed and required although they were issued without notice to the parties interested, which means the parties to the litigation; for the rights of those not parties are in no way disturbed by the issuance of certificates either with or without notice.[3]

It is but fair and just that all the parties be notified of the application; and as the jurisdiction to authorize the issuance of certificates is to be exercised cautiously and sparingly, the careful and conservative chancellor will refuse to make the order until proper notice has been given, that he may be fully and intelligently advised

[1] Wallace v. Loomis, 97 U. S. 146, 163; Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434, 463.

[2] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434; Mercantile Trust Co. v. Kanawha & Ohio Railway Co. 50 Fed. R. 874; Laughlin v. U. S. Rolling Stock Co. 64 Fed. R. 25.

In the first case cited it was held that the power of the court to order the issue of certificates and render them a prior lien "does not depend on consent, nor on prior notice.* * * A full opportunity * * * to be heard on evidence as to the propriety of the expenditures and of making them a first lien is judicially equivalent. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loan." But it was declared that when "prior lienholders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect, and amount of all such certificates, as fully as if such questions were then for the first time, presented for determination. If it appears that they ought not to have been made a charge upon the property, superior to the lien created by the mortgage, then the contract rights of the prior lienholders must be protected. On the other hand if it appears that the court did what ought to have been done even had the trustee and the bondholders been before it when the certificates were authorized to be issued, the property should not be relieved from the charge made upon it in good faith for its protection and preservation."

[3] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434, 476; Meyer v. Johnston, 53 Ala. 237; Snow v. Winslow, 54 Io. 200; Stevens v. Douglas, 57 Hun, 498.

as to the necessity for such action. But the power of the court to preserve the property and keep it in a good and safe condition "does not depend on consent or on prior notice."[1]

Section 406. **The Order is to be Strictly Construed and Followed.**—The validity of the certificate depending wholly upon the order of the court, whose officer the receiver is, it is held that the terms of the order are to be strictly construed and followed. The certificate must be issued precisely as the order provides, and for the express purpose proposed. The force and intent of the order are not to be extended by implication.[2] Accordingly, where an order appointing a receiver of a railroad company, authorized him to issue certificates "for money borrowed, material furnished or labor performed," such certificates to be treated as receiver's indebtedness, and to constitute a first lien on the road, it was held that the receiver was not authorized to issue certificates in payment for material until it had been furnished, and that certificates issued for material contracted to be delivered, but which in fact never was delivered, were void, and that, inasmuch as they recited upon their face that they were issued under an order of the court, "whether, under the order, the receiver had the power to issue negotiable securities, or for property agreed to be delivered at a future day, were legal questions which the plaintiff was bound to determine at his peril."[3] Neither can certificates be lawfully issued at a higher rate of interest than that allowed by law,[4] nor at a greater discount than provided in the order.[5] The disposition of certificates in a manner and for a purpose other than as provided in the order will affect their validity; and it will not avail the purchaser that he paid for them in good faith.[6]

Section 407. **For What Specific Purposes Certificates May be Issued—(*a*) In General.**—The rule of first and essential consequence upon this point ought to be that the expenditure contemplated is

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[1] Mercantile Trust Co. v. Kanawha & Ohio Railway Co. 50 Fed. R. 874; Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

[2] See Tennessee v. Edgefield & Kentucky R. R. Co. 6 Lea, 353; Newbold v. Peoria & Springfield R. R. Co. 5 Bradw. 367; Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co. 42 Fed. R. 872; Stanton v. Alabama & Chattanooga Railroad Co. 31 Fed. R. 585.

[3] Bank of Montreal v. Chicago, Clinton & W. R. R. Co. 48 Iowa, 518, 524. *Cf.* Bank of Montreal v. Thayer, 7 Fed. Rep. 622.

[4] Meyer v. Johnston, 53 Ala. 237, 351.

[5] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

[6] Stanton v. Alabama & Chattanooga Railroad Co. 31 Fed. R. 585.

absolutely necessary in order to preserve the property from destruction or serious injury. This was the pretense upon which the issue of receiver's certificates was at first attempted to be justified, and in the earlier cases it will be found to have been always the reason assigned. But, latterly the courts have shown a tendency to relax, little by little, somewhat of the strictness of this rule, and to authorize the issue of these debentures for a variety of purposes, including preferential debts of the company.[1] The supreme court of the United States, speaking generally, has held that they may lawfully be authorized "to raise money necessary for the preservation and management of the property."[2]

The just criterion of the propriety of the issue of receivers' certificates ought to be the necessity of the expenditures for which it is proposed to raise means;[3] and beyond this the courts, at least in theory, do not seem inclined to go.[4] In succeeding sections, however, the consideration in detail of the cases in which certificates have been authorized will go far to show that in practice the courts have exercised their power in this respect very liberally.

Section 408. (*b*) **For the Preservation of the Property.**—A mortgagee in possession may expend upon the mortgaged property such sums as are necessary to his own protection. He is entitled to keep his security unimpaired. In accordance with this principle we find that, in a case where it appeared by the report of the receiver that the railroad property was in such need of repairs that it could not be operated with safety to the traveling public, the court authorized the receiver to make the repairs, and, the current income not being sufficient, to issue receivers' certificates of indebtedness therefor, and declared the expenditure to have been incurred for the benefit and protection of the property.[5]

Again the issue of certificates has been authorized for the purpose of putting the road in repair, and for its operation and for the purchase of such rolling stock as was necessary.[6] The receiver may be authorized to borrow money upon his certificates "not for con-

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[1] See section 391.

[2] Wallace v. Loomis, 97 U. S. 146, 162.

[3] Jones on Railroad Securities, section 533 *et seq*; Cowdrey v. Galveston, etc., R. R. Co. 1 Woods, 331.

[4] Shaw v. Railroad Co. 100 U. S. 605, 612; Meyer v. Johnston, 53 Ala. 237, 348.

[5] Hoover v. Montclair & Greenwood Lake R. R. Co. 29 N. J. Eq. 4; Credit Co. (Limited) of London v. Arkansas Central R. R. Co. 15 Fed. Rep. 46.

[6] Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500, 569; Wallace v. Loomis, 97 U. S. 146, 162. *Cf.* Union Trust Co. v. Chicago & Lake Huron R. R. Co. 7 Fed. Rep. 513; Central Trust Co. v. Tappan, 6 N. Y. S. 918.

venience or ornament; not to lay out money in ways not essential to the preservation of the property, although the court may think the value of it will be thus increased; not for the completion of an unfinished work, or the improvement, beyond what is necessary for the preservation of an existing one, but to keep it up, to conserve it as a railroad property pending litigation."[1] It is, however, in Pennsylvania, a question whether the court has the power to grant receivers of a railroad authority to create a car-trust loan to provide for the rolling stock and equipments of the road, when the income of the road is sufficient to meet the expense, the income being applied instead to pay interest to bondholders. The judge said: "To the extent that the earnings of the road are required to keep it up, in stock and equipments, and to preserve the property, the receivers have authority so to apply it; but to borrow money to enable them to continue to pay interest to bondholders I consider unwise."[2]

Section 409. (*c*) **For Operating Expenses.**— It is the receiver's duty — indeed his principal duty — pending the foreclosure proceedings, and while the property is in his hands, to operate the road. This is required not only by the duty which is owed to the public, but also by a proper regard to the interests of the bondholders. In order to be of any value as a security for their advances the road must be kept a "going concern." The reciver may, therefore, properly issue certificates to meet operating expenses, in default of sufficient current income;[3] to procure necessary rolling stock, machinery and supplies;[4] to pay off tax liens upon the property,[5] or to replace earnings diverted from operating expenses and ordinary repairs.[6] So, also, where it was necessary to insure the safety of the

[1] "The Doctrine of Receiver's Certificates," by R. F. Stevens, Jr., 23 Cent. Law Jour. 340, citing Meyer v. Johnston, 53 Ala. 237, 346; Jerome v. McCarter, 94 U. S. 734; Bank of Montreal v. Chicago, etc., R. R. Co. 48 Iowa, 518; Barton v. Barbour, 104 U. S. 126; Union Trust Co. v. Chicago, etc., R. R. Co. 7 Fed. Rep. 513; Turner v. Peoria, etc., R. R. Co. 95 Ill. 134; Swann v. Clark, 110 U. S. 602.

[2] *In re* Philadelphia & Reading R. R. Co 14 Phila. 501, 502; s. c. *sub nom.*, Taylor v. Philadelphia & Reading R. R. Co. 9 Fed. Rep. 1.

[3] Turner v. Peoria, etc., R. R. Co. 95 Ill. 134; Stanton v. Alabama, etc., R. R. Co. 2 Woods, 506; Meyer v. Johnston, 53 Ala. 237, 346; Hoover v. Montclair, etc., R. R. Co. 29 N. J. Eq. 4; Swan v. Clark, 110 U. S. 602. But see Metropolitan Trust Co. v. Tonawanda Valley, etc., R. R. Co. 103 N. Y. 245.

[4] Swann v. Clark, 110 U. S. 602. But see *In re* Philadelphia & Reading R. R. Co. 14 Phila. 501.

[5] Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434; Humphrey v. Allen, 101 Ill. 490. *Cf.* Taylor v. Philadelphia, etc., R. R. Co. 7 Fed. Rep. 377.

[6] Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434.

trains, that a portion of the track which had been hastily built should be relaid in a substantial manner, the receiver's certificates to meet the expense were approved.[1] And, in another case, where the receivers found, upon taking possession of the property, that several locomotives were in use by the company, under a lease from the maker, for which the rent was unpaid, they were authorized to issue certificates to pay the rent.[2]

Section 410. (*d*) **For the Payment of Debts Due to Employes and for Material and Supplies Incurred Prior to the Receivership.**—There is to be found some authority for the rule that a receiver may be allowed to issue certificates in payment of labor, materials, supplies and taxes upon the property due prior to his appointment.[3] But in New York, in a recent case, wherein the issue was fairly presented, the court of appeals held, reversing the lower court, that a court in that state had no power to authorize a receiver to pay, or to issue his certificates of indebtedness in payment for labor and services in operating the road prior to his receivership, and to make the certificates so issued a lien prior to the mortgage.[4] In passing upon this point the court said: "Notwithstanding the argument of the respondent's counsel, we are unable to discover any principle upon which the claims of the employes, for labor performed before the appointment of the receiver, can be so extended as to diminish, or impair or postpone the lien of the mortgage for the enforcement of which the action is brought, or the lien of the mortgage set up by the Farmers' Loan and Trust Company. Both are prior in point of time to the respondent's claims, and we are referred to no statute which displaces them." [5]

There is a statute in New York by which a different relation is established between the receiver of an insolvent railroad corporation and its employes, and under which the receiver is obliged to pay the wages of the employes in preference to all other debts and claims, no distinction being made between wages earned before and those earned after the appointment.[6]

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[1] Stanton v. Alabama & Chattanooga R. R. Co. 2 Woods, 506; Credit Co. (Limited) of London v. Arkansas Central R. R. Co. 15 Fed. Rep. 46. *Cf.* Barton v. Barbour, 104 U. S. 126.

[2] Coe v. New Jersey Midland R. R. Co. 27 N. J. Eq. 87. See also Turner v. Peoria & Springfield R. R. Co. 95 Ill. 134.

[3] Humphreys v. Allen, 101 Ill. 490; Taylor v. Philadelphia & Reading R. R. Co. 7 Fed. Rep. 377.

[4] Metropolitan Trust Co. v. Tonawanda Valley, etc., R. R. Co. 103 N. Y. 245 (1886); s. c. 1 Ry. & Corp. L. J. 65; reversing s. c. 40 Hun, 80 (1885).

[5] As to payment of preferential debts see section 390. See also section 412.

[6] Laws of New York, 1885, chap. 376.

Where, upon an application for the distribution of the surplus moneys arising upon the foreclosure of a mortgage, subject to which the Rockaway Beach Improvement Company had purchased the mortgaged premises, it appeared that after the purchase, and in April, 1880, the company executed a mortgage on the same property to one Soutter, trustee, to secure the payment of certain bonds; that in August, 1880, the company becoming embarrassed, one Attrill, a large stockholder, brought an action against it, to which neither the trustee of the mortgage nor the holders of bonds thereunder, were made parties, praying for the appointment of a receiver and the dissolution of the company. An order having been made in this action appointing a receiver, and thereafter *ex parte* orders being made authorizing the receiver to borrow a large sum to pay wages due the workmen, and to issue certificates therefor, such certificates to be a first lien upon all the property of the company, and to have priority over the mortgage to Soutter, it was held that there was no principle upon which the claims of employes for labor performed, before the receiver was appointed, could be so extended as to impair or postpone the lien of the mortgage, and that affidavits showing that the property was in danger of being destroyed by the unpaid workmen unless such certificates were issued, did not authorize the court to make the order. The court said: "After a careful examination of the case we think that the weight of authority is not in favor of an order which sets aside liens to the advantage of a general creditor; that it is only the income of the property which courts apply to the payment of current expenses before the mortgage debt is paid; that it is not right to entirely displace the lien. There were no earnings, and there are no receiver's certificates which have a right of payment before the Soutter mortgage."[1]

Section 411. (*e*) **For the Completion of the Road.**—The supreme court of the United States has approved of receiver's certificates that were issued to pay for finishing a canal, in aid of which the government had made a grant of land, conditioned upon the completion of the canal within a fixed time, saying, per Strong, J.: "Hence there was a necessity for making the order which the court made, a necessity attending the administration of the trust which the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors."[2]

[1] Raht v. Attrill, 42 Hun, 414, 418 (1886), citing Burnham v. Bowen, 111 U. S. 776, 782.

[2] Jerome v. McCarter, 94 U. S. 734, 738.

And where it appeared that it was necessary to complete a portion of the road in order to secure a land grant, which was a material part of the security of the bondholders, Judge Dillon authorized the receiver to borrow money and complete the road within the prescribed time. "It is manifest," he said, "that unless a receiver is appointed no further work will be done on the extension lines, and that the land grant, which is the only security of any considerable value which the plaintiffs and the other bondholders have for their large advances, will lapse and be wholly lost. In order to save this land grant the road must be completed by December 3d, ensuing, and it seems to me that the exigencies of the case are such as, under the circumstances, to warrant the court, upon the application of the parties chiefly interested, to appoint a receiver and clothe him with the authority desired." [1]

In Iowa, also, the court of last resort has approved of the issue of certificates by a receiver for the purpose of completing and building certain portions of the road in his hands, at the rate of $8,000 per mile upon the whole road completed and to be completed, making the outlay a first lien upon the property.[2]

But in Shaw v. Railroad Company[3] it is held that, except under very extraordinary circumstances, the power of the court ought never to be exercised to enable the trustees, where the road is unfinished, to borrow money by means of receivers' certificates, which create a paramount lien upon the property, in order to complete the work. In the opinion Waite, C. J., said: "The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be, that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required, without asking the courts to engage in the business of railroad

[1] Kennedy v. St. Paul & Pacific R. R. Co. 2 Dill. 448; s. c. 5 Dill. 519. The form of the order in this case may well be consulted; it is said by Mr. Jones to be "most carefully drawn." Jones on Railroad Securities, section 535, n. See also Jerome v. McCarter, 94 U. S. 734, to which reference is made *supra*.

[2] Bank of Montreal v. Chicago, Clinton, etc., R. R. Co. 48 Iowa, 518; *Acc.* Gibbert v. Washington, Virginia Midland, etc., R. R. Co. 83 Gratt. 586, 645; Southerland, trustee, etc., v. Lake Superior Ship Canal R. R. & Iron Co. (U. S. Dist. Ct. Mich. E. D.), MS., cited in Meyer v. Johnston, 53 Ala. 237, 388; Hyde v. Sodus Point, etc., R. R. Co. (N. Y. Sup. Ct.), MS. Id.

[3] 100 U. S. 605, 612.

building." And in another case, in speaking to this point, it is aptly said: "It is no part of the duty of a court of chancery to build railroads, and the assent of all parties interested in the property cannot make it one."[1]

It is plain that an unlimited exercise of power by the court in this direction would amount to improving the mortgagor out of his property.[2] Accordingly the court will construe strictly an authority granted to the receiver to construct a road, and a mere authority to borrow money to build will not authorize the receiver to contract for municipal aid in the work.[3] And an issue of certificates for such a purpose in excess of the amount authorized, is beyond the power of the receiver, and the certificates are void.[4]

Section 412. **Further and Generally of the Purposes for Which Certificates May Issue.**—The equitable principle which gives support and justification to the doctrine of receivers' certificates requires that they be issued only for the purpose of preserving and protecting the trust property and properly and safely continuing its operation. But the doctrine has not been always so strictly applied.

Certificates given to secure and pay a debt due a merchant, incurred by the company giving orders on him to employes in payment of wages, were declared invalid, for the reason, it was said, that the debt was not for wages, but simply a store account against the company.[5]

It has been held that a receiver of a small narrow gauge railroad, appointed on the petition of a comparatively small holder of stock, will not be authorized to issue receivers' certificates and improve the road, when the measure is opposed by all other interests. It was said that where a receiver is appointed on such petition, and not at the instigation of bondholders, and no earnings have been diverted to pay interest on the bonds, there is no lien or equity requiring the payment of past due labor and material claims out of the *corpus* of the property by the issuance of receivers' certificates; but that there are equitable rights concerning whatever net earnings the receiver may realize; but such earnings cannot be antici-

[1] Credit Co. of London v. Arkansas Central R. R. Co. 15 Fed. Rep. 46. To the same effect see Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500, 569; s. c. 46 Id. 792, and *cf.* Secor v. Toledo, Peoria & Warsaw R. R. Co. 7 Biss. 513.

[2] Sandon v. Hooper, 6 Beav. 246; 2 Jones on Mortgages, section 1126.

[3] Smith v. McCullough, 104 U. S. 25, 29.

[4] Newbold v. Peoria & Springfield R. R. Co. 5 Bradw. 367.

[5] Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co. 42 Fed. R. 372.

pated by raising money on receivers' certificates except by agreement of the parties.[1]

It has been declared that a court of equity has power, when in possession of railway property in a foreclosure action, to authorize the creation of debts for rolling stock and other purposes when in its opinion it is necessary so to do to secure the continued and successful operation of the road, and to charge the debt so created as a first lien on the mortgaged property.[2]

In approving the issuance of certificates for repairs the supreme court of the United States said: "A railroad, with its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern." [3]

It has been adjudged that receivers' certificates may be issued for the following purposes: To replace earnings expended for betterments.[4] To repair road and complete unfinished part of line.[5] To purchase rolling stock and supplies necessary for the proper operation of the road.[6] To complete a canal to save a land grant.[7] To repay money borrowed to pay wages and purchase supplies, and which is secured by mortgage on chattels of the trust estate.[8] To pay taxes,[9] which has been said to be simply substituting one lien for another.[10]

The authorities are conflicting as to the power of courts to issue certificates for the payment of antecedent or preferential debts of the company.[11] As antecedent debts of a certain nature are to be preferred and constitute a charge on the *corpus* of the property,[12] there can be no reasonable objection to issuing certificates and hastening the payment of claims that will have to be met in the end. There is high authority for issuing certificates to provide the means to pay preferential debts of the company. The United States supreme court has expressly recognized the exercise of such power, declaring it to be the duty of the court to provide for the payment

[1] Street v. Maryland Central Railway Co. 56 Fed. R. 25.

[2] Villas v. Page, 106 N. Y. 439.

[3] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

[4] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

[5] Swann v. Wright, 110 U. S. 590.

[6] Turner v. Railroad Co. 95 Ill. 134; Swann v. Wright, 110 U. S. 590; Humphreys v. Allen, 101 Ill. 490.

[7] Jerome v. Carter, 94 U. S. 134.

[8] Langdon v. Railroad Co. 228.

[9] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

[10] Hanna v. State Trust Co. 70 Fed. R. 2.

[11] See sections 412 and 413.

[12] See sections 390 and 391.

of debts of the company due to employes and for operating expenses.[1] But the power to issue certificates for such purpose has been denied.[2]

Section 413. **The Priority of the Lien Created by the Certificates.**—Receivers' certificates are, as a rule, expressly declared, by the order of the court under which they are issued, to be a first lien upon the entire property, income and franchises of the road. There has been, therefore, but little litigation thus far upon this point. The theory of the matter is this: The expenditure is necessary to preserve the property; the court orders it to be made; it is, therefore, properly a lien prior to the mortgage, and must be paid first. These facts, or some others equivalent thereto, and the order of the court declaring the lien, are usually recited in the body of the certificate itself. The power of a court of equity to authorize the issue of certificates by the receiver, and to make them a first lien upon the property, payable before the first mortgage bonds, is not questioned in any of the cases in our state or federal reports. It has been expressly upheld in many leading cases.[3]

Thus, in a leading case, it was held that, where a railroad and its appurtenances are in the hands of a receiver, to be preserved and operated, the court having charge thereof must possess the power to allow the issue of certificates of indebtedness creating a first lien, when this is necessary to raise money for the economical management and conservation of the property, until it shall be disposed of; and the proper mode of objecting to any order authorizing such issue is by application to the chancellor to vacate and set it aside.[4] And, again, by the supreme court of the United States, in a recent case, the position is taken that, where receivers' certificates are issued for necessary repairs, or to pay tax liens, or to replace earnings diverted to pay for operating expenses and ordinary repairs, they create a lien, prior to the bonds, on the *corpus* of the property; and, further, that the holders of interest-bearing receivers' certificates, taken within the limit of discount allowed by the court in the order

[1] Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434, also United States Trust Co. v. Railroad Co. 25 Fed. R. 800; Taylor v. Philadelphia & Reading Railroad Co. 7 Fed. R. 377; Humphreys v. Allen, 101 Ill. 490.

[2] Metropolitan Trust Co. v. Tonawanda Valley & Cuba Railroad Co. 103 N. Y. 245.

[3] Credit Co. of London v. Arkansas Central R. R. Co. 15 Fed. Rep. 46; Wallace v. Loomis, 97 U. S. 146, 162; Miltenberger v. Logansport R. R. Co. 106 U. S. 286, 309; Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434, 451, 454; Stanton v. Alabama, etc. R. R. Co. 2 Woods, 506; Hoover v. Montclair & Greenwood Lake R. R. Co. 29 N. J. Eq. 4.

[4] Meyer v. Johnston, 53 Ala. 237, 350.

authorizing the certificates to be issued, are entitled to the face of the certificates and the interest.[1]

We find, therefore, that the courts do not hesitate to create these liens upon mortgaged property, and that the legality and validity of receivers' certificates, as first liens, are not disputed in the reported cases.[2] But issuing certificates cannot disturb the rights of lien-holders who are not parties to the proceedings.[3] A receiver appointed in a proceeding instituted by a stockholder cannot issue certificates to the displacement of the mortgage lien.[4]

Section 414. **Of the Necessity for Consent of Parties to the Issue—Effect of Consent.**—It is not true that the power of a court to authorize the issuance of receivers' certificates depends upon the consent of the parties to the litigation, or either of them. The public character of the property, the necessity to preserve and operate it properly and safely, give and demand the exercise of the power. It has been expressly declared that the exercise of this power "does not depend on consent or on prior notice." [5]

The section in which is discussed the question of necessity of notice [6] should be considered in connection with the present topic.

To assert that consent of either of the parties is essential to the validity of the certificates, is to deny the existence of power in the court to authorize their issue. The judicial act would, in such an event, be but the exercise of a privilege granted by the parties.

The fact that the mortgagees or other lien-holders have caused the property to be placed in the custody and control of the court, thereby imposing upon it the duty of preserving and operating the property, is in itself consent that all shall be done that is necessary

[1] Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434.

[2] Upon the general question of priority in these cases, see Dunham v. Cincinnati, etc. R. R. Co. 1 Wall. 254; Huidekoper v. Locomotive Works, 99 U. S. 258; Denniston v. C., A. & St. L. R. R. Co. 4 Biss. 414; Duncan v. Mobile & Ohio R. R. Co. 2 Woods, 542; Brown v. Erie Ry. Co. 19 How. Prac. 84; Vatable v. New York, etc. R. R. Co. 96 N. Y. 49; Turner v. Indianapolis, etc. R. R. Co. 8 Biss. 315; Atkins v. Petersburgh R. R. Co. 3 Hughes, 307; Davis v. Gray, 16 Wall. 203; Douglas v. Cline, 12 Bush, 608; Tomney v. Spartenburg, etc. R. R. Co. 4 Hughes, 640; Kelly v. Receiver of Green Bay, etc. R. R. Co. 10 Biss. 151; s. c. 5 Fed. Rep. 846; Calhoun v. St. Louis, etc. R. R. Co. 9 Biss. 330; Ellis v. Boston, Hartford & Erie R. R. Co. 107 Mass. 28; Coe v. C., P. & I. R. R. Co. 10 Ohio St. 372; Gurney v. Atlantic, etc. R. R. Co. 58 N. Y. 358; Union Trust Co. v. New York, etc. R. R. Co. 25 Fed. Rep. 803.

[3] See section 405.

[4] Hanna v. State Trust Co. 70 Fed. R. 2.

[5] Mercantile Trust Co. v. Kenawha & Ohio Railway Co. 50 Fed. R. 874; Union Trust Co. v. Illinois Midland Railway Co 117 U. S. 434.

[6] Section 405.

to preserve and operate the road. If lien-holders are averse to having equitable and just principles enforced, and to the chancellor fully and effectually performing his duty, to the extent of disturbing their liens, they should pursue their strict legal remedy, and not ask favor of a court of equity.

The recognition by the trustee of the paramount lien of receivers' certificates is binding on the mortgagees,[1] and they are estopped from objecting to the superior lien of the certificates.[2]

Section 415. **Statutory Provisions in Reference to the Lien of Receivers' Certificates.**— In some of the states receivers are authorized by statute to borrow money and to create liens upon the mortgaged property in their hands. Thus, in New Jersey, the receiver of an insolvent railway corporation is empowered to operate the road, and all his expenses incident to the proper operation of it are made a first lien upon the receipts, and must be paid before any other encumbrance whatsover.[3] So, also, in Ohio the statute provides that the earnings of a railroad, in the hands of a recciver, shall be first applied to the costs and expenses of the suit and to operating expenses, and for the satisfaction of judgments recovered against the receiver for injuries to persons or property, for servants' wages or materials furnished during the period of the receivership.[4] And in Vermont[5] and in some other states there are statutory regulations as to the matter of receivers' expenditures and liens.[6]

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[1] Kent v. Lake Superior Ship, Railway & Iron Co. 144 U. S. 75.

[2] Kneeland v. Luce, 141 U. S. 491. In this case it was said: "The consent of the trustee to the issue of the certificates bound every bondholder. * * * Under all the circumstances of the case the bondholders are precluded from claiming priority over the receiver's certificates, which were issued for the purpose of preserving the mortgaged property. * * * The certificates are all of them payable to bearer. No one of them is now held by the original parties, but they have all passed into the hands of third persons for a valuable consideration. Those persons had a right to rely on the promise of the court as to their priority plainly borne on their face, when the consent of the trustees, and thus of the bondholders, was given to their issue."

See further upon this topic section 405. Also chapter upon receivers' certificate in "An Investor's Notes on American Railways," by John Swann; Williams v. Washington City, etc., Railroad Co. 33 Gratt. 586, 624; Blythe v. Lewis, 75 Va. 701; Skiddy v. Atlantic, etc., Railroad Co. 3 Hughes, 320; Jessup v. Atlantic & Gulf Railroad Co. 3 Woods, 441; Hale v. Frost, 99 U. S. 389.

[3] Revision of N. J. 1877, 196, section 106.

[4] Laws of Ohio, 1872, 31, sections 1, 3, 4.

[5] Genl. Stat. 1870, 924; Acts of 1866, No. 41, page 53.

[6] See Wood on Railways, section 483, page 1677; Jones on Railroad Securities, section 544.

Section 416. **Negotiability of Receivers' Certificates — Rights of Assignees.**— A receiver's certificate is a debt not of the company, but of the receiver as an officer of the court appointing him. The faith of the court is pledged to its payment, at least to the extent of the property in the receiver's hands.[1] But if the fund, or property, be not sufficient to pay all the certificates in full, the holders of them are entitled to a *pro rata* share of the proceeds.[2] Again, receivers' certificates are not commercial paper. They generally consist rather of an acknowledgment of indebtedness than of an express promise to pay. The fund upon which they are drawn is usually uncertain, and there is no one personally liable for their payment. The fund in the receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the court by whose authority they were issued. It is, therefore, the rule that they are not negotiable instruments.[3] Their transfer by assignment, or even by delivery when made payable to bearer, enables the purchaser, or assignee, to recover upon them only to the extent of the rights of the first payee. And the assignor, or endorser, is not liable as a guarantor or endorser of commercial paper; nor does the assignment of them import a warranty that they are collectable or that they will be paid.[4]

It follows from the fact that these certificates are non-negotiable instruments that, when they are issued without consideration, they are invalid, even in the hands of a *bona fide* holder for value. Accordingly where, under a contract for the purchase of rails, a receiver issued certificates which recited the order of court and were payable to bearer, in a suit to enforce their redemption brought by an innocent holder to whom the certificates had been transferred, it appearing that the rails had never been tendered or delivered to the receiver, it was held that there could be no recovery, upon the ground that, inasmuch as the certificates themselves referred on their face to the order under which they had been issued, the holder was bound to take notice of the limitation of the receiver's

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[1] Meyer v. Johnston, 53 Ala. 349.

[2] Turner v. Peoria & Springfield R. R. Co. 95 Ill. 134.

[3] Turner v. Peoria & Springfield R. R. Co. 95 Ill. 134; Bank of Montreal v. Chicago, etc. R. R. Co. 48 Iowa, 513; Union Trust Co. v. Chicago & Lake Huron R. R. Co. 7 Fed. Rep. 513; McCurdy v. Bowes, 88 Ind. 583; Stanton v. Alabama, etc. R. R. Co. 2 Woods, 506; Newbold v. Peoria, etc. R. R. Co. 5 Bradw. 367; Central National Bank of Boston v. Hazard, 1 Ry. & Corp. L. J. 347 (U. S. Circ. Ct. Northern District of N. Y. March, 1887); Wood on Railways, p. 1676; Stanton v. Alabama & Chattanooga Railroad Co. 31 Fed. R. 585; Union Trust Co. v. Illinois Midland Railway Co. 117 U. S. 434.

[4] McCurdy v. Bowes, 88 Ind. 588.

power, and to know whether the certificates had been lawfully issued.[1]

The same rule is laid down in the leading case of Stanton v. Alabama & Chattanooga Railroad Company,[2] in the following luminous language: "I entirely agree with the master that these certificates have not the quality of negotiable instruments by the law merchant. In my judgment power conferred upon receivers to issue certificates does not authorize the issue of a bond, or other negotiable instrument, which shall be good in the hands of a *bona fide* holder for value, no matter what vice or infirmity may attend its original creation. The paper issued must be governed by the authority under which it is issued, and not by the form the receivers may choose to give it."

The master's report, to which reference is made in the preceding quotation from Mr. Justice Woods' opinion, contained the following discriminating language concerning the nature and quality of these, at that time, comparatively new securities: "These securities, until within a few years, were unknown; they are all directed to be issued by special appointees of the court, clothed with special and limited authority; and in relation to a particular case. On their face they refer to the particular power thus conferred, and to the particular case then pending in the court. This is a sufficient notice to put a prudent dealer on inquiry. The order imperatively declares that the certificate should not be disposed of at less than ninety cents on the dollar. Any act by the receiver which disposes of them at less than ninety cents is *ultra vires*. The first taker would derive no title from such a transaction, and a subsequent holder would occupy no better position. These certificates may be likened to the English debentures of a business corporation, as to which it has been well settled that, when issued by the directors without due authority, under the seal of the company, they cannot be enforced by members of the company who accepted them after being present at the meeting when the irregular issue was sanctioned, and a *bona fide* transferee of such debentures from such shareholders will stand in no better position, nor can strangers, or their assignees, enforce them where they were accepted by the first holders with knowledge that the condition on which they were issued had not been fulfilled."[3]

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[1] Bank of Montreal v. Chicago, Clinton & Western R. R. Co. 48 Iowa, 518.

[2] 2 Woods, 506, 515.

[3] Stanton v. Alabama, etc. R. R. Co. 2 Woods, 506, 512, citing *In re* Magdalena Steam Navigation Co. Johns. (Eng. Chan.) 690; s. c. 6 Jur. (N. S.) 975. The late Mr. Philip Phillips, of Washington

This seems to be the position uniformly taken by the courts upon this point, and the later cases are to the same effect.[1]

It is also held that the negotiation and sale of certificates is a trust personal to the receiver which he cannot delegate to an agent, in such a way as to relieve himself from responsibility.[2] The purchaser buys at his peril; he must know whether the terms of the order under which the issue has been made, have been duly complied with.[3] Accordingly an over issue is void, even in the hands of *bona fide* holders for value.[4] But when money is advanced in good faith upon such an overissue of certificates, and is used by the receiver in payment of overdue coupons for interest upon the mortgage indebtedness, the persons advancing the money may be subrogated to the rights of the coupon holders, and may receive the proportion due to such coupons out of the proceeds of the foreclosure sale, upon final distribution.[5] But if a receiver execute and place upon the market certificates containing false and fraudulent representations intended to deceive purchasers, he is personally liable thereon in an action for damages brought by one who purchases the certificates in good faith, relying upon such representations.[6]

Certificates sold by the receiver for less than the discount named in the order will entitle the assignee of the purchaser to recover only the actual amount of money paid for them originally.[7]

The use of the word "negotiable" by the supreme court of Alabama, in the leading case upon receivers' certificates[8] has been taken to mean what it represents as applied to promissory notes.

City, was the master from whose report the preceding extract is made.

[1] Turner v. Peoria & Springfield R. R. Co. 95 Ill. 134; Bank of Montreal v. Chicago, Clinton, etc. R. R. Co. 48 Iowa, 518; Baird v. Underwood, 74 Ill. 176; Husband v. Eppling, 81 Id. 172; Newbold v. Peoria, etc. R. R. Co. 5 Brawd. 377. *Cf*, West v. Foreman, 21 Ala. 400; Corbett v. State, 24 Ga. 287; Harriman v. Sanborn, 43 Me. 128; Railroad Co. v. Howard, 7 Wall. 392, 415; Mechanics' Bank v. New York & New Haven R. R. Co. 13 N. Y. 599; Voshell v. Hanson, 36 Md. 92; Union Trust Co. v Souther, 107 U. S. 591; Fosdick v. Schall, 99 U. S. 235; Fosdick v. Car Co. Id. 256; Bright v. North, 2 Phila. 216.

[2] Union Trust Co. v. Chicago & Lake Huron R. R. Co. 7 Fed. Rep. 513. In this case, where one purchased certificates from an agent or broker of the receiver at a considerable discount, and the agent did not account to the receiver for the proceeds, it was held that the purchaser could not recover upon the certificates.

[3] Bank of Montreal v. Chicago, etc., R. R. Co. 48 Iowa, 518.

[4] Newbold v. Peoria, etc., R. R. Co. 5 Bradw. 367.

[5] Ibid.

[6] Bank of Montreal v. Thayer, 7 Fed. R. 622.

[7] Stanton v. Alabama & Chattanooga Railroad Co. 31 Fed. R. 585.

[8] Meyer v. Johnston, 53 Ala. 237.

But evidently the court only meant to speak of such certificates as being transferable and saleable.

Section 417. **Who May Question the Validity of Receivers' Certificates—When the Question May be Raised.**— Although, as has already appeared, receivers' certificates are not negotiable instruments, yet if a receiver in foreclosure proceedings be authorized to issue them in payment of operating expenses, rentals, taxes and improvements incurred before his appointment, a bondholder desiring to question their validity and priority of lien must do so before they are sold. And if, with knowledge of the facts, he permits them to be sold without objection, both he and those claiming under him with notice of the facts, will not afterwards be heard to question the payment of the certificates in full out of the proceeds of the foreclosure sale, prior to a distribution among the bondholders.[1] Particularly will the bondholders be bound by the issue, when they appoint a committee of their own number to represent them in matters pertaining to the management of the property, and the committee consents to the issue of the certificates.[2] Upon the same principle, namely, that of estoppel, the purchaser at the foreclosure sale, having no interest in the trust fund represented by the certificates, cannot contest the validity of their issue, or question the amount for which they were declared to be a lien upon the property. The decree of foreclosure, adjudicating the certificates to be a lien in a specified amount, binds equally the purchaser and all persons claiming under him.[3]

Where the road has been sold under the decree of foreclosure subject, as is usual, to the lien of the receiver's certificates, the purchaser is concluded. It does not lie in his mouth to urge that the issue was invalid, or in fraud of somebody's rights. He has acquired his title subject to all such liens and priorities as may be allowed by the court to come in prior to the mortgage indebtedness, and he cannot, after such liens have been established, in the regular way, in the proceedings incident to foreclosure, dispute

[1] Humphreys v. Allen, 101 Ill. 490. *Cf.* Langdon v. Vermont & Canada R. R. Co. 53 Vt. 228.

[2] Langdon v. Vermont & Canada R. R. Co. *supra.* But see also the dissenting opinion of Walker, J., in Humphreys v. Allen *supra.*

[3] Central National Bank of Boston v. Hazard (U. S. Circ. Ct. Northern District of New York, March, 1887), 1 Ry. & Corp. L. J. 347; Swann v. Wright's Executor, 110 U. S. 590; Swann v. Clark, Id. 602. See also Adams v. Barnes, 17 Mass. 367; Campbell v. Hale, 16 N. Y. 585, 589; Horton v. Davis, 26 N. Y. 495; Freeman v. Auld, 44 N. Y. 50; Harkinson v. Sherman, 74 N. Y. 88; Grissler v. Powers, 81 N. Y. 57; Freeman on Judgments, section 162.

their validity.[1] But if the railway is sold to satisfy the certificates, the sale will not divest a mechanic's lien claimed by a creditor for the construction of the road, if he had instituted proceedings to enforce his lien before the appointment of a receiver, and was not made a party to the suit in which the receiver was appointed and in which the property was sold. In such a case, the receiver in no way represents the creditor claiming the lien, and the property is therefore to be regarded as having been sold subject to his lien.[2]

Section 418. **Payment of Certificates — Enforcing — Fund.** — In as much as receivers' certificates are acknowledgments of indebtedness rather than promises to pay money, and because they are constituted, by an order of a court, a lien upon a fund to be ascertained, rather than the personal undertaking, either of the railway company or the receiver, they are not, in general, such commercial obligations as will support an action at law for their enforcement or collection, and it is not usual to bring suits to compel their payment. The order of court under which they are issued, as a rule, not only makes them a lien on the fund to be derived from the sale of the mortgaged property, but also provides that they are to be paid out of the purchase money.[3] Accordingly the usual practice in seeking their payment is by motion to the court by whose authority they were issued. This is, in general, the only way to compel the redemption of receivers' certificates.[4] The holders of these securities must see to it that, in the order distributing the purchase money, a proper provision is incorporated for their redemption; because if once the property is sold and the court makes a final decree without providing for the payment of the certificates, and the receiver is discharged, there is, in some sort, an end of the matter.[5] The receiver cannot then be sued; the court has no longer either the suit or the property under its control, and is powerless to compel payment of such obligations. In one such case it seems to have been held that the purchaser took the property subject to all claims which might be enforced against the receiver.[6] In any case,

[1] Swann v. Wright's Executor, 110 U. S. 590.

[2] Snow v. Winslow, 54 Iowa, 200. See section 413.

[3] Wallace v. Loomis, 97 U. S. 146, 162; Miltenberger v. Logansport R. R. Co. 106 U. S. 286, 309; Union Trust Co. v. Illinois Midland Ry. Co. 117 U. S. 434, 454.

[4] Turner v. Peoria & Springfield R. R. Co. 95 Ill. 134.

[5] Text quoted and approved in Gordon v. Newman, 10 U. S. C. C. App. 587; s. c., 62 Fed. R. 686.

[6] Farmers' Loan & Trust Co. v. Central R. R. Co. of Iowa, 7 Fed. R. 537. But here the court had in the final decree reserved jurisdiction to enforce as liens upon the property all liabilities, incurred by the receiver.

as of course, where the fund or property, in the hands of the court is not sufficient in amount to redeem the certificates in full, the holders will be entitled only to *pro rata* shares of the proceeds of the sale.[1]

When the payment of certificates is not limited in the order to any particular fund, any such limit on the face of the certificates is of no force or consequence, because they are "the mere forms by which the order of the court was executed," and the holder may look to the general assets, to the prejudice of general creditors, for payment.[2]

In an intervening action to prevent the payment of certificates as a prior lien, the receiver is a necessary party defendant.[3]

Section 419. **Application of Doctrine to Strictly Private Corporations — Taxes and Operating Expenses.**— As the power of courts to authorize the issuance of receivers' certificates is founded in part on the public character of railroads and consideration for public convenience and necessity, it follows logically that it is not to be extended beyond *quasi* public corporations; never to strictly private corporations; those which may be closed up without in any way interfering with public convenience and comfort.

Upon this question Judge Gresham said: "It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receivers' certificates representing particular indebtedness, and, as already stated, then only on principles having no application to the mortgages executed by a private corporation owing no duty to the public. * * * The limited power which courts may exercise in displacing the liens of railroad mortgages will not and cannot extend to mortgages executed by private corporations. * * * Extensive as are the powers of courts of equity they do not authorize a chancellor to thus impair the force of solemn obligations and disturb vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages, sometimes with un-

[1] Turner v. Peoria & Springfield R. R. Co. 95 Ill. 134.

[2] Appeal of Neafie, 12 At. R. 271.

[3] Central Trust Co. v. Sheffield & Birmingham Coal, Iron & Railway Co. 44 Fed. R. 526.

warranted freedom, on account of their peculiar nature, to all mortgages. The power does not exist and the application is denied."[1]

"This doctrine," said another federal judge, "has never been applied to mining or manufacturing companies. It is, owing to the *quasi* public character of such companies, confined to railroad corporations."[2]

On petition of a receiver for authority to issue certificates for the purpose of recommencing and carrying on the business of producing iron from the ore at the works of an insolvent company it was held that without the consent of all the lien-holders the court had no power to authorize the receiver of a private corporation, whose business is not affected by any public interest, to issue certificates, which will be a paramount lien upon its property, for the purpose of carrying on its business, unless it be necessary to do so in order to preserve the existence of the property or franchise. It was said that to issue certificates requires them to have priority over the liens of other creditors; that such is of recent origin and is the outgrowth of the necessity of keeping in active operation a railroad corporation that has been brought into the possession and control of a court of equity by the appointment of a receiver.[3]

The United States circuit court of appeals[4] has expressly declared that a receiver of a private corporation cannot be authorized to issue certificates to carry on the business of the corporation, and make them a first and paramount lien on the *corpus* of the trust estate. It was said that the rule authorizing the issuing of receivers' certificates and constituting them a paramount lien on the property is based on the public character of railroad companies, and is not to be extended to mere private corporations, but to those only of a *quasi* public character.

But in the case cited an exception was made to the rule concerning private corporations, it being held that, as taxes are a first and paramount lien on property, a receiver of a strictly private corporation may be authorized to borrow money, and issue certificates to pay them; for this would not be doing more than changing the form of the lien.

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[1] Farmers' Loan & Trust Co. v. Grape Creek Coal Co. 50 Fed. R. 481; Hooper v. Central Trust Co. (Md.) 32 At. R. 505.

[2] Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co. 42 Fed. R. 372; Seventh National Bank v. Shenandoah Iron Co. 35 Fed. R. 488; Laughlin v. United States Rolling Stock Co. 64 Fed. R. 35.

[3] Fidelity Insurance, Trust and Safe Deposit Co. v. Roanoke Iron Co. 68 Fed. R. 623.

[4] Hanna v. State Trust Co. 70 Fed. R. 2.

The supreme court of Texas has held that the doctrine of receivers' certificates is applicable to strictly private corporations; but in the case in which the announcement was made the corporation was a *quasi* public one, it being a water company, and engaged in supplying water to the public, and the certificates were issued to pay operating expenses.[1] But it was considered as a mere private corporation, it being said that the same rules authorizing the issuing of certificates by a railway receiver and constituting them prior and paramount liens, applies to receivers of private corporations. The reasoning of the court was, that as the appointing court had power to make the expenses of operating the company's plant a charge on the property, in the event the earnings were insufficient to pay them, it had power to authorize the issuing of certificates to pay such expenses and make them a paramount lien on the property. This would be merely doing the same thing in a different way.

It must be confessed that the logic of the opinion is persuasive. When the purpose of the certificates is to secure funds to pay strictly operating expenses and liabilities, there is no satisfactory reason why the power to issue them should be denied in receivership proceedings affecting strictly private corporations; the lienholders having caused the property to be placed in the custody of the court, and being responsible for its continued operation.

All difficulty in this particular may and should be avoided by courts refusing to carry on the business of a strictly private corporation. It is not the business of a court to carry on the business of such a corporation.[2]

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[1] Ellis v. Vernon Ice, Light & Water Co. 86 Tex. 100.

[2] Hanna v. State Trust Co. 70 Fed. R. 2. See section 477.

CHAPTER XIV.

RECEIVERS OF CORPORATIONS OTHER THAN RAILWAYS, INCLUDING NATIONAL BANKS.

I.

OF THE APPOINTMENT GENERALLY.

Section 420. Introductory.
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422. Further of the Inherent Powers of Courts of Equity to Appoint Receivers of Corporations—Illustrations.
423. Generally of the Statutory Powers of Courts of Equity to Appoint Receivers of Corporations.
424. Under What Circumstances the Appointment will be Made—The Reluctance to Appoint — Care and Caution — On Petition of Minority Stockholders — Exhausting Remedy in Corporation — Illustrations.
425. Insolvency of Corporations as Cause for Receivers.
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427. Appointment by the Executive.
428. Statutes Authorizing the Appointment to be Strictly Construed and Followed.
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434. Statutes Authorizing the Appointment — Construction — Illustrations.
435. In Cases of Insolvency Under Statute.
436. Power to Appoint in Foreclosure Cases.
437. The Appointment as Incident to a Creditor's Bill—Sequestration.
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III.

Of Receivers of National Banks.

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I.

Of the Appointment Generally.

Section 420. **Introductory.**—In this chapter there is a consideration of such matters as are peculiar to receiverships of incorporated companies in general, exclusive of railway corporations. In the two chapters immediately preceding will be found the law as it is peculiar to those corporations.

While, in the whole, the general rules of law concerning receiverships will be found to apply, it is nevertheless essential to a complete presentation of the subject to consider separately, not only the law of railway receiverships, but also of receiverships of corporations generally.

The law of receivers of corporations is not so much an exception to the general rules of law applicable to receiverships, as it is an extension and enlargement, by statutory provisions, of the inherent powers of courts of chancery in this regard.

Section 421. **The Extent of the Inherent Power of Courts of Equity to Appoint Receivers of Corporations.**—It is frequently asserted that the power of a court of equity to appoint a receiver of a corporation and sequestrate its assets is wholly statutory;[1] but the proposition is not logical and is not supported by reason or the current of the authorities.

It is to be conceded that the inherent powers of a court of equity over corporations are, indeed, very limited; but equity supplies the deficiencies of the law in respect of corporations as well as of individuals; and a creditor or stockholder of a corporation may, under some conditions, seek a remedy in a court of equity, when otherwise he would suffer injury.

It may be correctly asserted that a court of equity has no inherent power to dissolve a corporation or declare a forfeiture of its charter.[2] This proposition is founded on the principle that the government creates corporations through its legislative representa-

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[1] *In re* Atlas Iron Construction Co. 38 N. Y. S. 172: *In re* Binghamton General Electric Co. 143 N. Y. 268.

[2] Decker v. Gardner, 124 N. Y. 334; People ex rel. v. The Judge, 31 Mich. 456; Thompson on Cor., sections 4538, 4539; Walters v. Anglo American Mortgage & Trust Co. 50 Fed. R. 316; Atlantic Trust Co. v. Consolidated Electric Storage Co. 49 N. J. E. 402, 404; French v. Gifford, 30 Io. 148; French Bank Case, 53 Cal. 550; Neall v. Hill, 16 Cal. 145; State ex rel. v. Second Judicial District Court, 39 Pac. R. 316; Mason v. Equitable League, 77 Md. 483; Fisher v. Supreme Court (Cal.), 42 Pac. R. 561; *In re* Atlas Iron Construction Co. 38 N. Y. S. 172.

tives, and it alone can, in like manner, destroy them. From the earliest times courts of equity have never exercised such power, without statutory authority.

Hence, when the suit is merely for the purpose of dissolving a corporation, and there is no statute conferring such power on the court, the application for a receiver must be refused; for, when the remedy sought cannot in the end be granted, a receiver will not be appointed.[1]

The authority to declare a forfeiture of a corporate franchise was originally invested in the courts of law in England, and was exercised in a proceeding instituted directly for that purpose by the attorney-general, as the representative of the government. The high court of chancery never assumed jurisdiction in such cases, and it was only when jurisdiction over corporate bodies was conferred by legislative enactment that it undertook to appoint receivers of corporations.

The courts of chancery in America, having adopted the English rule, have usually, before their jurisdiction was enlarged by statute, declined to sequestrate the property of a corporation by means of a receiver, or to wind up its affairs, or to control or restrain the usurpation of franchises by corporate bodies, or by persons claiming, without right, to exercise corporate powers, or to displace the corporate management and substitute their receivers and to restrain their operation.[2]

[1] See section 48.

[2] Decker v. Gardner, 124 N. Y. 334; Fischer v. Supreme Court, 42 Pac. R. (Cal.) 566; United States Trust Co. v. New York, West Shore & Buffalo R. R. Co. 101 N. Y. 478, 483 (1886); Attorney-General v. Utica Ins. Co. 2 Johns. Ch. 371; Attorney-General v. Bank of Niagara, Hopk. 354; Bangs v. McIntosh, 23 Barb. 591; Howe v. Deuel, 43 Barb. 504; Waterbury v. Merchants' Union Express Co. 50 Barb. 157; Belmont v. Erie Ry. Co. 52 Barb. 637; Neall v. Hill, 16 Cal. 145; French Bank Case, 58 Cal. 495. *Cf.* Baker v. Administrator of Backus, 32 Ill. 79; Pond v. Farmingham & Lowell R. R. Co. 130 Mass. 194. But see Blatchford v. Ross, 54 Barb. 42; s. c., 5 Abb. Pr. (N. S.) 434; s. c., 37 How. Pr. 110; Adler v. Milwaukee Patent Brick Manufacturing Co. 13 Wis. 57.

In the case of French v. Gifford, 30 Ia. 148, after referring to a number of cases the court said: "These cases sufficiently indicate the general view which the courts have taken of this interesting question. A little attention to them will discover that, although apparently in conflict, they are easily susceptible of reconciliation. Those of them in which the jurisdiction of equity is denied, are cases in which that jurisdiction was invoked for the purpose of depriving the corporation of its franchises, winding up its affairs, and distributing its assets. Those in which it is recognized are cases in which proceedings were instituted on behalf of stockholders against the officers of the corporation for fraudulent misapplication of funds, or breach of trust in the discharge of official duties. * * * The doctrine thus sustained

The winding up of the business and affairs of a corporation through a receiver has been said to be, in effect, a dissolution of the company, and, therefore, cannot be done by a court of equity without statutory authority. While the complete winding up of the affairs of a corporation cannot be said to amount to its dissolution, yet it is going to an extremity which courts of equity have refused to approach: it destroys the means afforded the corporation to transact business and virtually annihilates it, and practically puts the corporation out of existence.

As will hereafter be shown, a court of equity has inherent power to appoint a receiver and take charge of the affairs of a corporation under certain conditions. But its power to continue in charge of the corporate assets, as well as to dispose of them, is limited. It cannot destroy the corporation, or so control and dispose of its assets as to virtually prevent it again exercising its corporate powers. Its power, even in extreme cases, is not to be extended beyond preserving the assets. The court will take charge of the property until the trouble has been adjusted, when it "must lift its hand and retire."[1]

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by authority, and most in consonance with reason and justice, seems to be that courts of equity, aside from statutory provisions, do not exercise a jurisdiction over a corporation, as over a partnership, to dissolve it and distribute its assets; but that it will afford to stockholders relief from the malfeasance of those entrusted with the management of the corporate business."

In a California case the right of a court of equity to take charge of the affairs of the corporation through a receiver and run and manage the business was thus commented upon: "This is to displace the corporate management and to put into its place the receiver and court; and it seems to be well settled that a court has no power to do this except in cases where it has been given by statute, and that prohibition is the proper remedy for its attempted exercise. * * * It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction. * * * It is, in the first place, to be remarked that the jurisdiction to appoint a receiver in these cases is wholly statutory." Fischer v. Superior Court, 42 Pac. R. 561.

In the French Bank case, 53 Cal. 550, this was said: "There is no jurisdiction vested in these courts in such a case to dissolve the corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power. * * * It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction." Neall v. Hill, 16 Cal. 145.

[1] State ex rel v. Second Judicial District Court (Cal.) 39 Pac R. 316.

See further upon this topic, section 425.

As a general proposition courts of equity have no original and inherent power to appoint receivers of corporations and seize and sequestrate their property. But there are exceptions to the rule, to be now stated.

In proceedings to foreclose a mortgage the court has inherent power to appoint a receiver of a corporation. In fact this jurisdiction was first exercised in foreclosure proceedings.[1]

In suits by judgment creditors to enforce satisfaction of their claims, the receiver may be appointed without statutory authority.

Where the corporate property has been abandoned, and is exposed to certain injury and loss, a receiver may be appointed at the suit of a stockholder or creditor. And the power may also be exercised where the corporation has no officers to care for its property and manage its business, and injury and loss are threatened.[2]

Where a banking corporation issued notes contrary to the express prohibition of the banking laws of the state, and, to secure the notes had made its deed of trust transferring certain securities, a receiver was appointed to take charge of the securities during the pendency of the suit.[3]

Where by the acts of the directors the corporate property is subjected to immediate loss and peril, and where the funds are being embezzled, a court of equity will appoint a receiver and protect the interests of stockholders and creditors.[4]

A federal court has held that a court of equity has inherent power to seize and administer the assets of an insolvent building and loan association.[5]

It may be stated, as a general proposition, that where, from any cause, the property of a corporation is exposed to imminent peril; or where it is necessary to protect the interests of stockholders and creditors by the appointment of a receiver, and there is no other adequate remedy, a court of equity has inherent power to appoint a receiver and take charge of the property and affairs of the corporation for the purpose of preserving the assets and protecting the interests of stockholders and creditors.

The exercise of such jurisdiction over corporations must be most sparingly and cautiously exercised, and only in cases of extreme

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[1] Section 1.

[2] Lawrence v. Greenwich Insurance Co. 1 Paige, 587.

[3] Leavitt v. Yates, 4 Edw. Ch. 173.

[4] Thompson v. Greeley, 107 Mo. 557. See comments of Smith, P. J., upon this case in Ford v. Kansas City & Independence Short Line Railroad Co. 52 Mo. App. 439.

[5] Towle v. American Building, Loan and Investment Co. 60 Fed. R. 181.

necessity.[1] But when the facts justify and require the interposition of the court, it should not hesitate to act.

In the second case cited in the last note this was said: "The power of this court to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as well settled. But I think it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation, and protect the rights and interests of its stockholders."

It follows necessarily that the control of the court of the corporate property must be but temporary. "The court," it has been correctly said, "will take charge of the property until there is an adjustment of the trouble, or the election of a new board of directors; and when the officers are ready to proceed in the proper discharge of their duties the court must lift its hand and retire."[2]

In the case of Greely v. Thompson[3] this was said: "These authors place the want of jurisdiction on the ground that a forfeiture of the corporate franchises can only be declared in a court of law in a proceeding in the name of the state, and the appointment of a receiver and a sequestration of the corporate property would suspend the functions of the corporation and virtually operate as an annihilation of corporate rights. These are persuasive reasons why courts should act with great caution, and not take the management of the concerns of corporations out of the hands of directors and managers, to whom the law has intrusted it, except in cases of urgent necessity. It is no reason against the jurisdiction of the courts when equity alone can grant adequate relief or protection to stockholders and creditors. These authorities, we think, recognize the jurisdiction, but limit its exercise to cases of extreme necessity. It may be here remarked, also, that the temporary control of an insolvent corporation by a court and a receiver does not operate as a dissolution and forfeiture of its franchise. After the debts have been paid and the necessary capital restored, this corporation could resume business under its original charter."

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[1] Thompson v. Greeley, 107 Mo. 577; Edison v. Edison United Phonograph Co. 89 At. R. 195.

[2] State *ex rel.* v. Second Judicial District Court, 89 Pac. R. 816.

[3] 107 Mo. 577.

Section 422. **Further of the Inherent Powers of Courts of Equity to Appoint Receivers of Corporations — Illustrations.** — In Evans v. Coventry,[1] the plaintiffs were interested in the funds of an association which was formed for the purpose of insuring its members. A large portion of these funds were lost through the negligence of the defendants, who were its directors. The secretary had absconded with a considerable part, and the remainder was in danger of being wasted. The motion for a receiver and an injunction was denied by the vice-chancellor, but this decision was reversed on appeal to the House of Lords. The grounds of this branch of equitable jurisdiction are clearly set forth in the opinions of the lord justices. Knight Bruce, L. J., observed: "The application before the court is founded on the common right of persons who are interested in property, which is in danger, to apply for its protection;" and Lord Justice Turner remarked: "The plaintiffs are in the position of parties who have a charge on the funds of what I may, for the present purpose, call the original association. The defendants are in the position of trustees of the association. It appears that funds of that association have been lost by the act of the treasurer, whose conduct it was the duty of the other defendants to superintend. *Prima facie*, therefore, there appears a clear case for the interference of the court; for I certainly cannot accede to Mr. Selwyn's argument, that a breach of trust is not a sufficient ground for the interference of the court by the appointment of a receiver. Whether the plaintiffs will ultimately establish the commission of a breach of trust is not the question now before the court. It is admitted that funds have been lost, of which it was the duty of the defendants to take care. That loss is *prima facie* evidence of a breach of the duty of the defendants, sufficient to authorize the interference of the court by the appointment of a receiver."

The property of a corporation transferred by a general assignment to trustees without the consent of its shareholders, the franchise of the corporation being abandoned, would also constitute such a trust fund, and a court of equity would, upon the application of a creditor, exercise its inherent authority and appoint a receiver.[2]

The question how far equity will interfere with the tolls and franchise of such a corporation as a bridge company, in aid of judgment creditors, where the chief value of the property consists in the tolls

[1] 5 DeG., M. & G. 911.

[2] Buck v. Piedmont & Arlington Life Insurance Co. 4 Fed. Rep. 849; s. c. 4 Hughes, 415.

and franchise, is not altogether free from difficulty. But it is held by the supreme court of the United States that, where the rents and profits of the company for a given period are sold under execution, and purchased by the judgment creditor, he, with other judgment creditors, may, upon a bill in equity, have a receiver to collect the tolls and pay them into court, to the end of discharging the judgment indebtedness. And the relief is extended, in such a case, upon the ground of the inadequacy of the remedy at law and the difficulty of obtaining complete satisfaction of the judgments without the aid of equity.[1]

Section 423. **Generally of the Statutory Powers of Courts of Equity to Appoint Receivers of Corporations.**—Statutory provisions giving to courts of equity the power to appoint receivers of

[1] Covington Drawbridge Co. v. Shepherd, 21 How. 112, 124. In this case the corporation was created by act of the Legislature of the State of Indiana, and built a drawbridge over the Wabash river in that State, pursuant to its charter. Judgments were recovered against the corporation in the United States Circuit Court for the District of Indiana, under which execution was levied upon the bridge as real property, and the marshal sold the rents and profits of the bridge under the execution for the term of one year, the execution creditor becoming the purchaser. He, with other judgment creditors, then filed a bill in the United States Circuit Court and obtained a decree appointing a receiver, with direction to take possession of the bridge, receive its tolls and pay them into court, to be applied in satisfaction of the judgments *pro rata*. This was affirmed by the Supreme Court of the United States, the court, Catron, J., saying: "By the laws of Indiana lands and tenements cannot be sold under execution until the rents and profits thereof, for a term not exceeding seven years, shall have been first offered for sale at public auction; and if that term, or a less one, will not satisfy the execution, then the debtor's interest or estate in the land may be sold, provided it brings two-thirds of its appraised value. The tolls, under the idea that they were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation (owning no corporate property but this bridge), unless equity can afford relief. * * * All that we are called on to decide in this case is that the court below had power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls and pay them into court, to the end of discharging the judgments at law; and our opinion is that the power to do so exists, and that it was properly exercised. It is, therefore, ordered that the decree below be affirmed, and the circuit court is directed to proceed to execute its decree."

corporations are to be strictly construed and followed. "Authority to appoint a receiver," it has been said, "should be strictly construed; and the power to wrest the property of a corporation from the management of the directors and officers should never be doubtingly exercised."[1]

The consideration already given to the question of the power and duties of statutory receivers should be read in connection with the subject of this section.[2]

When the statute is so worded as to require the appointment of a receiver under certain prescribed conditions, the court will, of course, have no discretion to exercise, but, on proof of the existence of the conditions, must make the appointment.

All the conditions of the statute must be shown to exist.[3]

Section 424. **Under What Circumstances the Appointment Will be Made—The Reluctance to Appoint—Care and Caution—On Petition of Minority Stockholders—Exhausting Remedy in Corporation—Illustrations.**—In the early exercise of the jurisdiction to appoint receivers of corporations, courts of equity were averse to granting applications for the appointment. But in late years there has been a display of a strong judicial inclination to appoint receivers of corporate bodies. "There has been, indeed," says the supreme court of Alabama, "too much facility on the part of chancellors * * * in the exercise of this authority."[4]

The appointment of a receiver in a proceeding against any defendant is always a matter of sound judicial discretion. "Before a court possessing this power will take the property of an individual or of a corporation out of the hands of its lawful and proper custodian and commit it to its own officer, there must be a clear and well-grounded proof of *impending mischief*."[5]

"The power to appoint receivers is, in all cases, exercised with great caution. * * * Peril of the trust fund alone moves the court to displace the trustees from the exercise of their legal rights over the trust fund; * * * and unless such peril is shown by specific allegations, supported by clear proof, the court ought not to interfere."[6]

"Before the court will take charge of the corporation and thus displace its chosen directors and managers it ought to have the

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[1] *In re* Lewis, 52 Kans. 660.

[2] See sections 264 and 428.

[3] Atlantic Trust Co. v. Consolidated Electric Storage Co. 49 N. J. E. 402. See section 434.

[4] Briarfield Iron Works Co. v. Foster, 54 Ala. 622.

[5] Thomp. on Cor. section 6826.

[6] Ft. Payne Furnace Co. v. Ft. Payne Coal & Iron Co. 96 Ala. 472.

clearest evidence of the absolute necessity for such extraordinary caution for the protection of the creditors, stockholders and all parties concerned."[1] "The power to wrest the property of a corporation from the management of the directors and officers should never be doubtingly exercised."[2] "The practice in courts of equity * * * is never to resort to the extreme remedy of taking the property out of the hands of the managers chosen and elected by the stockholders except as a last resort, and when considered to be absolutely necessary for the preservation of the trust fund."[3]

"The power of appointing a receiver is a discretionary one to be exercised with great circumspection, and only in cases where there is fraud, spoliation, or imminent danger of the loss of the property if the immediate possession should not be taken by the court; and such facts must be clearly proved."[4]

"The policy of the law is to leave the affairs of corporate bodies to the management and control of their own chosen agents and that a minority of stockholders will not be permitted to displace corporate authority and control by substituting either for the policy, management and control of the courts, except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them."[5]

The necessity of and right to the appointment of a receiver must be free from reasonable doubt to justify the court to grant the application.[6] So long as the directors keep within the scope of their powers, and act in good faith and with honest motives, their acts are not subject to judicial control or revision. And where the controversy is a question of mere discretion in the management of the corporate business, or of doubt in accomplishing the purpose for which the corporation was organized, the remedy by appointment of a receiver will be denied.[7]

It is the rule that courts of equity will not, at the suit of a stockholder, resort to the extreme remedy of taking the property out of the hands of the managers elected by the stockholders, except as a last resort, and when considered to be absolutely necessary for the preservation of the trust fund.[8]

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[1] Consolidated Tank Line Co. v. Kansas City Varnish Co. 43 Fed. R. 204.

[2] *In re* Lewis, 52 Kans. 660.

[3] United Electric Securities Co. v. Louisiana Electric Co. 68 Fed. R. 673.

[4] Davis v. United States Electric Power & Light Co. 77 Md. 35; Hand v. Dexter, 41 Ga. 454.

[5] Roman v. Woolfolk, 98 Ala. 219.

[6] Watkins v. National Bank, 51 Kans. 254.

[7] Edison v. Edison United Phonograph Co. (N. J. Ch.) 29 At. R. 195.

[8] United Electric Security Co. v. Louisiana Electric Light Co. 68 Fed. R. 673.

The power to appoint receivers generally, and of corporations specially, is an extraordinary one, "that should be exercised with great caution, and only when the circumstances of the case and the ends of justice require its exercise."[1]

"Courts of equity ordinarily will not take the management of the affairs of a corporation out of the hands of its own officers and intrust it to the control of a receiver of the court upon the application of either creditors or shareholders."[2]

The principles asserted are especially applicable to receivership proceedings instituted by the owners of a minority of the stock of a corporation. "The policy of the law is to leave the affairs of corporate bodies to the management and control of their own chosen agencies, and that a minority of stockholders will not be permitted to displace corporate authority and control by substituting therefor the policy, management and control of the courts, except in such cases of plain fraud or misadministration as works manifest oppression or wrong to them."[3]

The inclination of the courts is to discourage applications by minority stockholders for the appointment of receivers of corporations.[4] "The minority are largely under the control of the majority."[5]

The supreme court of Minnesota, through Mitchell, J., has said: "The appointment of a receiver of a solvent corporation on the application of a minority of the stock is a very drastic remedy, which could be justified only in a very strong case."[6]

"The very fundamental principle of a corporation is that a majority of its stockholders have a right to manage its affairs so long as they keep within their charter and rights. * * * The majority of a corporation have a right to manage their affairs as they think fit, so long as they keep within their charter; and a court of equity will not interfere to prevent unwise or improvident

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[1] Atlantic Trust Co. v. Consolidated Electric Storage Co. 49 N. J. E. 402.

[2] Davis v. Flagstaff Silver Mining Co. 2 Utah, 74.

[3] Roman v. Woolfolk, 98 Ala. 219.

[4] Ranger v. Champion-Press Co. 52 Fed. R. 609; Flukes v. Emporia City Railway Company, 48 Kans. 577.

[5] Ranger v. Champion Cotton-Press Co. 52 Fed. R. 609.

[6] Rothwell v. Robinson, 44 Minn. 588; Baltimore & Ohio Railroad Co. v. Cannon, 72 Md. 493.

In the case of Mason v. Pewabic Mining Co. 133 U. S. 63, it was held, that while in the settlement of the affairs of a dissolved corporation it is the right of a minority of the stockholders to have a decree for a receiver and a sale of the assets, yet there may be circumstances presented to a court of chancery that will justify a decree ascertaining their value in some fair and equitable manner without a sale, and making a distribution to shareholders on that basis.

acts; there must be fraud or the infringement of the legal rights of some one to justify taking matters out of the hands of the officials."[1]

In the case of Kerfoot v. Houck, recently decided by Judge Adams, district judge of the federal court, eastern division of the eastern district of Missouri, which was an application to vacate the appointment of a receiver of the St. Louis, Kennett and Southern Railroad Company, the opinion in which suit has not and probably will not be published, it was said: "The question, however, is still left whether the complainant has made such a case of mismanagement, waste and conversion of property as to entitle him * * * to the appointment of a receiver. It goes without saying that an application of this kind on the part of a single stockholder should be carefully scrutinized. It would be grossly subversive of all business interests if a single disgruntled stockholder could lightly make charges against an entire board of directors and all the stockholders of a company and easily secure an order taking away the property placed in their hands by the majority stock and by the law of the state where incorporated, and placing it in the hands of a receiver of the court for management. Presumptively and strongly so, in my opinion, the judgment of the entire board, and also all the other stockholders * * * ought to be more valuable than the judgment of the one complaining stockholder in respect of the management of the affairs of the corporation. It follows that, before the court ought to act on the petition of one stockholder for the appointment of a receiver of the corporate assets and business, a strong and convincing case of mismanagement, fraud and waste ought to be made out."

Another matter to be considered in proceedings by stockholders for the appointment of a receiver of the corporation is the requirement of the law that they should have first made every reasonable effort to secure redress and prevention of the threatened mischief within the company itself.[2] Until it is shown that every reasonable effort to obtain redress through the regularly constituted agents and controlling power of the corporation has proved unavailing, a stockholder cannot sue in his own name alone, nor on behalf of himself and other stock holders for the appointment of a receiver.[3]

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[1] Hand v. Dexter, 41 Ga. 454.

[2] Roman v. Woolfolk, 98 Ala. 219.

[3] Rathbone v. Parkersburg Gas Co. 31 W. Va. 798. A suit by a minority stockholder, the petition alleging negligent management of business by the directors, who owned a majority of the stock, that they had attempted to change the *situs* of the corporation to a place without the state, holding

A statute authorizing the appointment of a receiver " in the case where a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights," does not authorize the appointment of a receiver in *quo warranto* proceedings.[1] In such a proceeding a receiver cannot be appointed in the absence of statutory authority.[2]

Where the owners of a majority of the corporate stock of a turnpike company neglected and refused to make needed repairs in the roadway, thus rendering the property non-productive, a receiver may properly be appointed.[3]

If a building and loan association has no assets except those which it is proposed to distribute to its shareholders, a case is not made for the appointment of a receiver.[4] Where it was provided by statute that for certain causes a receiver could be appointed for an insurance company, it was held that the appointment would be made under the statutory conditions though the company had made an assignment.[5]

Where a bank had gone into liquidation and closed up its business leaving its assets and property in the hands of its former directors for some three years, without any accounting with the stockholders during that time, it was held that on the petition of a stockholder against the directors individually, charging abuse and neglect of their trust and wasting the property of the corporation, a receiver would be appointed by the court *ex parte* to take possession of the assets and make proper distribution thereof.[6]

Where the wells of a natural gas company became practically idle and its stock worthless, most of its members united in organizing a new company, and were about to turn over to it the pipe in the mains, which was the only valuable property left; held, on a bill filed by the manufacturer who had supplied the pipe, and who had

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moneys of stockholders there without notice, failure to keep a business office or books, and other mismanagement, was held to show a right of action for dissolution and appointment of a receiver, without alleging or proving any notice, request, demand or express refusal of the directors to mend their ways.

Further upon the subject of this section see section 441.

[1] Havemeyer v. Superior Court. 84 Cal. 327. The president of a corporation has no authority to confess a bill and consent to the appointment of a receiver to wind up the company's affairs. Walters v. Anglo-American Mortgage & Trust Co. 50 Fed. R. 316.

[2] Tull's Appeal, 159 Pa. 608.

[3] Wayne Pike Co. v. Hammons, 129 Ind. 368.

[4] Barton v. Enterprise Loan & Building Association, 114 Ind. 226.

[5] Relfe v. Commercial Insurance Co. 5 Mo. App. 178.

[6] Warren v. Fake, 49 How. Pr. 430.

not been paid in full, that a receiver would be appointed and the transfer enjoined.[1]

Where a corporation failed to pay a promissory note, and it was alleged that the corporation was insolvent and proposed to contract more debts by issuing first mortgage bonds, it was held that there was no abuse of discretion in granting an injunction and appointing a receiver, especially where the president of the company was appointed.[2]

An insolvent corporation with large properties scattered in different states assented to the filing of a creditor's bill and to the appointment of a receiver, and for nine months was inactive while the receiver was managing the property and assuming liabilities in reducing it to possession. It was held that the company could not afterwards, when a large majority of its creditors had become parties to the suit, and its property about to be distributed among the creditors, interpose objections as to want of jurisdiction on the ground that a court of equity could not obtain jurisdiction, and the plaintiff's creditors had a plain, adequate and complete remedy at law, or that their debts had not been converted into judgments, or that no execution had been issued or returned *nulla bona;* whatever weight might have been given to such defences if they had been interposed in the first instance.[3]

The Columbian Athletic Club, claiming the right and proceeding to conduct prize fights, was proceeded against by the state, and an injunction issued to prevent it misusing and abusing its corporate franchise and privilege and in maintaining its property as a nuisance. It was held that a receiver was properly appointed in aid of the injunction.[4]

In an action by a stockholder against the corporation and two of its directors, in which it was alleged that there was waste of the assets, wrong-doing and mismanagement of the directors and others confederating with them, and a scheme to wreck the corporation, the prayer being for an accounting from the directors and that the corporation and its officers be restrained from exercising any of the corporate rights and for the appointment of a receiver, it was held that the election of new and satisfactory directors removed the ground of action, and as there was no prayer for dissolution the receivership would not be continued.

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[1] Appeal of Hite National Gas Co. 12 At. R. 267.

[2] Wilcoxon Manufacturing Co. v. Atkinson. 78 Ga. 338.

[3] Brown v. Lake Superior Iron Co. 134 U. S. 530; Columbian Athletic Club v. State ex rel. McMahon (Ind.), 40 N. E. R. 914.

[4] Duncan v. Treadwell Co. 81 N. Y. S. 340; s. c. 82 Hun, 376.

When it appears that the corporation is not only insolvent, but that its creditors and president are fraudulently contriving to absorb all its property and that such property is threatened with sale under collusive judgments obtained by fraud, the corporation is in such condition that the court should administer its property as a trust fund for the benefit of its creditors, and a receiver should be appointed.[1]

A mere disagreement between the directors and stockholders as to the management of the business will not warrant the appointment of a receiver.[2]

In an action in a state court to forfeit the charter of a corporation, for which a receiver has been appointed by a federal court, it is proper to appoint a receiver with directions to him to apply to the federal court for possession of the property.[3]

A receiver will not be appointed to take possession of, vote upon and sell shares of the capital stock of a corporation.[4] Nor will a receiver be appointed for one corporation which owns all the stock of another, because of mismanagement and waste of the property of the latter.[5]

Section 425. **Insolvency of Corporation as Cause for Receiver.** —Aside from statutory provision insolvency alone is not a sufficient cause for the appointment of a receiver; and mere insolvency will not warrant the granting of such a drastic remedy. A court of equity has not inherent power to appoint a receiver of a corporation because of mere insolvency, which does not create those conditions of imminent peril and extreme necessity, which alone authorize the exercise of this extraordinary jurisdiction over corporate bodies.[6]

To question the proposition asserted would be to deny the right of the stockholders and officers of a corporation to manage and control the company's affairs under ordinary circumstances. "Courts of equity have no greater control over the affairs of a private cor-

[1] Doe v. Northwestern Coal & Transportation Co. 64 Fed. R. 928.

[2] Little Warrior Coal Co. v. Hooper (Ala.), 17 So. R. 118.

[3] State v. Port Royal and Augusta Railway Co. (S. C.) 23 S. E. R. 383.

[4] Wanneker v. Hitchcock, 38 Fed. R. 383.

[5] O'Connor v. Long Island Traction Co. 37 N. Y. S. 953.

[6] Pond v. Farmingham & Lowell Railroad, 130 Mass. 194; Lawrence Iron-Works Co. v. Rockbridge Co 47 Fed. R. 755; Cook v. East Trenton Pottery Co. (N. J. Ch.) 30 At. R. 534; Walters v. Anglo-American Mortgage & Trust Co. 50 Fed. R. 316; Doe v. Northwestern Coal & Transportation Co. 64 Fed. R. 928; Whitehead v. Hale (N. C.), 24 S. E. R. 360.

poration when it becomes insolvent than they have over the affairs of an individual."[1]

Section 426. **The Effect of the Appointment Generally.** — A court of equity has, in the absence of statutory power, no authority to dissolve a corporation.[2] Accordingly, a final order, or decree, appointing a receiver of a corporation does not, *in se*, operate as a decree of dissolution.[3] It is, in effect, a suspension of the powers of the corporation and of all control over its property and effects. It is also equivalent to an "injunction restraining its agents and officers from intermeddling with its property." In New York it was held that a stockholder could not maintain an action for a dissolution of the corporation of which he was a member, and, as he was not entitled to have the corporation dissolved, he could not have a receiver appointed.[4]

The appointment of a receiver for a corporation gives the receiver only the temporary management of its affairs, under the direction of the court, and the corporation still exists, and may, nevertheless, exercise any of its franchises, so long as it does not interfere with the rightful management of its affairs by the receiver, as his duties are defined by the order of the court appointing him. Thus where a railway corporation neglects or refuses to build a fence along its right of way, after notice by the owner of the adjoining land, the owner may build the fence and bring action to recover the value thereof against the corporation owning the road, or at his option, against the receiver in possession of the road.[5] Nor does the general and ordinary jurisdiction of courts of equity embrace the power to appoint a receiver in aid of a suit prosecuted against the corporation by a private person, but such power, if it exist at all, must be derived from a statute conferring it upon the court.[6] A

[1] Walters v. Anglo-American Mortgage & Trust Co. 50 Fed. R. 316.

Because of the peculiar features of a building and loan association it has been held that a court of equity has power to administer the assets of an insolvent association of such class. But to do so for mere insolvency alone would be against reason and authority. Towle v. American Building, Loan & Investment Society, 60 Fed. R. 131.

[2] Folger v. Columbian Ins. Co. 59 Mass. 267; The King v. Whitwell, 5 Term Rep. 88; Attorney-General v. Reynolds, 1 Eq. Cas. Abr. 131, pl. 10: Slee v. Bloom, 5 Johns. Chan. 380; State v. Merchants' Ins. Co. 8 Humph. 253. See also Angell & Ames on Corp, sections 899, 770, 777, and cases cited. See sections 421 and 429.

[3] Bank Commissioners v. Bank of Buffalo, 6 Paige, 497; Kincaid v. Dwinelle, 59 N. Y. 553; Pringle v. Woolworth, 90 N. Y. 510. See section 426.

[4] Denike v. New York & Rosendale Lime, etc. Co. 80 N. Y. 599, 608.

[5] Ohio & Miss. R. R. Co. v. Russell, 115 Ill 52.

[6] La Societe Francaise v. the District Court, 58 Cal. 495.

receiver of the property of a corporation displaces the directors or other body, that by its charter are authorized to manage its affairs, and, under the direction of the court by whom he is appointed, has the sole control of its property and its effects, and, when authorized so to do, the executive power to use its franchises; but the appointment of such a person should not be made unless in a case of necessity to protect the stockholders or creditors from loss, or to prevent an abuse of the corporate franchises.[1] In nearly all of the States of the Union, as well as in England, the jurisdiction of equity has been extended by appropriate legislation, with the view of providing a more effectual remedy for the protection of creditors and stockholders, to the appointment of receivers and the sequestration of the property of corporations, and sometimes to the extent of decreeing the forfeiture of their franchises and the winding up their affairs.

The corporation may sue and be sued and exercise many of its corporate powers after the appointment of a receiver, when its dissolution is not decreed.[2]

The mere appointment of a receiver does not dissolve the corporation.[3] Hence it may still sue and be sued. The effect of the appointment is to sequestrate its property; "but the corporation still retains its identity."[4] A pending suit against it may proceed to judgment.[5]

"It cannot be properly said that there is a 'devolution of liability' when a receiver is appointed on the voluntary dissolution of a corporation. He does not become liable for the debts. His duty is to distribute the assets in the manner prescribed by law."[6]

The appointment of a receiver is not a bar to suits brought against the corporation before the bill in the receivership proceeding was filed; nor do such suits abate in consequence of such appointment. The receiver can appear in and defend the suits if the interest which he represents renders it proper and necessary.[7]

The appointment of a receiver of a building and loan association terminates the liability of stockholders for monthly dues. It also terminates the contract with the mortgagor.[8] The appointment also

[1] City of Rochester v. Bronson, 41 How. Pr. 78, 82.

[2] See section 426. People ex rel. v. Third Avenue Savings Bank, 50 How. Pr. 22.

[3] See section 426; Del Valle v. Navarro, 21 Abb. N. C. 136: City Water Co. v. State (Tex.), 32 S. W. R. 1033.

[4] Del Valle v. Navarro, 21 Abb. N. C. 136.

[5] Hasselmann v. Japanese Development Co. 27 N. E. R. 318.

[6] Owen v. Kellogg, 56 Hun. 455.

[7] Page v. Knights and Ladies of Protection (Mass.). 37 N. E. R. 369.

[8] Buist v. Bryan (S. C.), 21 S. E. R. 537. See this case for general effect of appointment of receivers on building and loan associations and rights of members.

results in maturing the debts and mortgages due the association, and they may be collected at once.[1]

Where a statute provided for the appointment of a receiver for a corporation and disposition of the assets to the creditors it was said: "The receiver of an insolvent corporation becomes, as soon as he qualifies, invested, by force of the statute, with full power to demand, sue for, and take into his possession all of the property, of every description, belonging to the corporation, and to convert the same into money. * * * The effect of these two provisions, as it seems to me, is to fasten the debts of a corporation on its property the moment it is adjudged to be insolvent, and a receiver is appointed to wind up its affairs. From that time forth its property is, by law, appropriated exclusively and irrevocably to the payment of its debts." [2]

The passing of an insurance company into the hands of a receiver in no degree diminishes the individual liability of its stockholders for the debts of the company.[3]

While the affairs of an insolvent corporation are in the hands of a receiver, a creditor can not maintain an action in his own behalf against a stockholder to recover for stock held by the latter, but never paid for.[4]

The order appointing a permanent receiver in itself places the assets of the insolvent corporation in the hands of the court.[5]

It has been held that a policy-holder in a life insurance company could maintain an action against the company to compel a settlement of the dividends which should be apportioned to the plaintiff as her share of the profits, and to compel the company to go on transacting its business as required by its charter, notwithstanding that in a suit instituted by the attorney-general for the dissolution of the company a receiver had been appointed.[6]

Where a corporation borrowed money and directed its officers to pay over the same to another creditor, it was held the authority of the officers to pay over terminated on the appointment of a receiver for the corporation.[7]

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[1] Strauss v. Carolina Interstate Building and Loan Association (N. C.), 23 S. E. R. 450.

[2] Receiver of Graham Butter Co. v. Spielmann, 24 At. R. 371.

[3] Arenz v. Weir, 89 Ill. 25.

[4] Merchants' National Bank v. Northwestern Manufacturing & Car Co. 48 Minn. 364; Minnesota Thresher Manufacturing Co. v. Langdon, 44 Minn. 37.

[5] Clinkscales v. Pendleton Manufacturing Co. 9 S. C. 318.

[6] Bedell v. North American Life Insurance Co. 7 Daly, 278.

[7] First National Bank v. Dovetail Body & Gear Co. (Ind.) 42 N. E. R. 984

Neither a creditor nor a stockholder of a corporation can sue to enforce any right of the corporation without showing a refusal of the receiver to do so.[1]

The appointment of a receiver of an insurance company binds all policy-holders without further notice; and a loss after the appointment does not give the insured any greater rights than other policy-holders.[2]

An assignment for the benefit of creditors, made by a corporation after service of process on it in a suit by a creditor for the appointment of a receiver, does not deprive the court of jurisdiction to appoint a receiver.[3]

The appointment of a receiver under statute providing for dissolution of corporations, brings the property into the custody of the law, and thereafter the court has the power to protect it.[4]

Where a mutual benefit association, with branches in several states, became insolvent and went into the hands of a receiver, it was held that the benefit and reserve fund should be proportionately distributed among the certificate holders regardless of their residence, from which fund certificate holders who had attached property of the association were excluded unless they released such attachment or accounted for the property in their possession. Who are members and entitled to a distributive share in the fund should be determined by the constitution and by-laws of the association.[5]

Section 427. **Appointment by the Executive.** — Such legislation, although it vests the power of appointment in the executive department, has been held not unconstitutional. It does not impair the contract entered into in the charter, although it takes away the right, given therein to the company, to sue and be sued in its corporate name. The receiver is appointed to preserve and not to impair the rights of the parties concerned.[6] In Louisiana, under a special act of the legislature,[7] the governor has authority to appoint a liquidator of a corporation whose charter has been decreed forfeited. But in Illinois it was declared that the persons appointed under the act of 1847, to close up the affairs of a state bank, were not officers, but trustees, and that the executive of the state had

[1] Swope v. Villard, 61 Fed. R. 417; First National Bank v. Dovetail Body & Gear Co. 42 N. E. R. 934.

[2] Reliance Lumber Co. v. Brown, 30 N. E. R. 625.

[3] Belmont Nail Co. v. Columbia Iron and Steel Co. 46 Fed. R. 8.

[4] *In re* Christian Jensen Co. 128 N. Y. 550.

[5] Garham v. Mutual Aid Society (Mass.), 37 N. E. R. 447.

[6] Carey v. Giles, 9 Ga. 253.

[7] Act of March 15, 1855.

no authority, by virtue of his office, to appoint such trustees.[1] It was, however, held in Georgia that the authority to appoint receivers may be vested in the executive department;[2] and in Indiana, that a judge in vacation may appoint a receiver for a corporation which is in "imminent danger of insolvency."[3] Under the provisions of the National Banking Act the comptroller of the currency has the sole authority to appoint receivers over national banks.[4]

Section 428. **Statutes Authorizing the Appointment to be Strictly Construed and Followed.** — The courts are inclined to give such statutes a strict construction. They proceed with extreme caution in the exercise of their authority,[5] and require an exact compliance with all the prescribed formalities.[6] Thus where the statute authorized the court to proceed upon the petition of the judgment creditor, it declined to interfere upon the petition of his attorney, and a subsequent allowance by the court of an amendment to the petition failed to make the proceedings valid.[7] But under provisions which authorized a creditor to proceed by petition, it was held he might proceed by bill, as in the ordinary case of a creditor's suit, for the benefit of all the creditors.[8] Thus, in a *quo warranto* proceeding instituted by the attorney-general, under the former New York code of procedure, for a dissolution of a corporation and the forfeiture of its charter, it was held that the court had no authority to appoint a receiver before final judgment of forfeiture.[9]

Section 429. **The Extent of the Jurisdiction in Chancery.**— Although a court of chancery could not divest a corporation of its corporate character and capacity it could hold its trustees accountable for abuse of trust.[10] Accordingly while equity may compel officers of corporations to account for breaches of trust in their official capacity, yet, in the absence of statutes extending its jurisdiction, it

[1] People v. Ridgley, 21 Ill. 65.

[2] Carey v. Giles, 9 Ga. 253.

[3] First National Bank v. U. S. Encaustic Tile Co. 105 Ind. 227, 235.

[4] U. S. Rev. Statutes, section 5234.

[5] Oakley v. Paterson Bank, 1 Green. Ch. 173; Bangs v. McIntosh, 23 Barb. 591.

[6] *In re* Pyrolucite Manganese Co. 29 Hun, 429. See also Cook on Stock and Stockholders, section 634.

[7] Bangs v. McIntosh, 23 Barb. 591.

[8] Morgan v. New York & Albany R. R. Co. 10 Paige, 290.

[9] People v. Washington Ice Co. 18 Abb. Pr. 382. Under the statutes of New York the directors of a dissolved corporation are authorized to wind up its affairs. As to the right of the court to deprive them of this power where they are guilty of delay, see *In re* Pontius, 26 Hun, 232. See section 423.

[10] Angell & Ames on Corp. section 777.

will usually decline to assume control of and wind up the affairs of a corporation, upon a bill filed by a stockholder alleging fraud, mismanagement and collusion on the part of the corporate authorities, in as much as such interference would result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly. The remedial power exercised by courts of equity in these cases ordinarily extends no further than an injunction against any special misconduct on the part of the officers; and although the facts shown may be sufficient ground for an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the hands of its own officers, and placing them in charge of a receiver,[1] except in cases of extreme necessity, when it will preserve the estate and protect the interests of all concerned.[2]

In the case of Waterbury v. Merchants' Union Express Co.[3] a stockholder prayed a dissolution of the defendant corporation and the appointment of a receiver, upon the ground of the alleged misconduct of the managing committee. The judge, denying the motion, said: "The infidelity or misconduct of some, or even of all, of the trustees or managers of such an association affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it or taking away its management and placing it in the hands of an officer of the court. In such a case the principles of remedial, or preventive, justice go no further than to enjoin or forbid the misconduct, or remove the unfaithful officer. I am not aware of any authority for dissolving a corporation, or an unincorporated stock association, or for taking its management from its proprietors or shareholders on the mere ground that one, or even all, of its trustees are unfaithful. The court may enjoin the trustee or suspend and remove him, and, if necessary, may order a new election, but cannot substitute its own officer." But in Blatchford v. Ross,[4] the court was inclined to a contrary view, and intimated, in a *dictum*, that the fact that the managers repeatedly voted to themselves large sums of money for their services as promoters was a sufficient ground for a receiver.

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[1] Waterbury v. Merchants' Union Express Co. 50 Barb. 157; Neall v. Hill, 16 Cal. 145; Howe v. Deuel, 43 Barb. 504; Belmont v. Erie Ry. Co. 52 Barb. 637.

[2] Thompson v. Greeley, 107 Mo. 577. See section 421.

[3] 50 Barb. 157.

[4] 54 Barb. 42; s. c. 5 Abb. Pr. (N. S.) 434; s. c. 34 How. Pr. 110.

Section 430. **Of Injunction as Concurrent Relief.**—Upon the appointment of a receiver of the property of a corporation, for the purpose of closing up its affairs, it is proper to restrain its directors and officers from collecting debts and demands due to the corporation, and from paying out, assigning or delivering any of its property, money or effects to any other person, or from encumbering the property.[1] And upon a complaint filed against a corporation to declare its dissolution, under the thirty-eighth section of the article of the Revised Statutes of New York relative to proceedings against corporations in equity, the plaintiff may apply for an injunction to restrain creditors from proceeding at law to obtain satisfaction of their claims, and for an order allowing them to come in and make theselves parties to his suit.[2]

It is a question whether a receiver appointed by the court in such an action and in a case not provided for by the forty-fifth section of the article relative to proceedings against corporations in equity, will have the statutory powers of receivers of moneyed corporations, or only such powers as the court of chancery can confer upon receivers appointed in ordinary suits in that court.[3] Upon a creditor's bill against an insolvent corporation, an injunction depriving the officers of the corporation of the control of the whole property, should not be granted *ex parte* on the certificate of the vice-chancellor, or master, out of court; but, upon the appointment of a receiver for closing up the corporate affairs, an injunction should issue restraining the officers of the corporation from interfering with the corporate property in any manner.[4] Where a statute regulating the winding up of banking corporations by receivers, provides that no action shall be maintained against a bank after the appointment of a receiver, but that all creditors shall have their remedy under the statute, the courts will not entertain an action brought against the bank by one of its creditors, such an enactment being regarded as constitutional and within the power of the legislative branch of the government.[5]

Section 431. **Injunction May be Granted Without Receiver.**—Where the court decides to restrain the operations of the company by an injunction, it will not necessarily and in every case appoint a

[1] Morgan v. The New York & Albany R. R. Co. 10 Paige, 290.

[2] Mickles v. The Rochester City Bank, 11 Paige, 118.

[3] Mickles v. The Rochester City Bank, 11 Paige, 118.

[4] Morgan v. New York & Albany R. R. Co. 10 Paige, 290.

[5] Leathers v. Shipbuilders' Bank, 40 Me. 886.

receiver, since the two forms of relief are distinct. The circumstances may demand a suspension of the corporate business while the officers may be free from any misconduct. As they were entrusted by the stockholders with the control of the property and affairs of the corporation, the court will consider them the most appropriate persons to wind up its affairs and will sometimes leave them in charge,[1] but will require them to act under its direction and control.[2] It should be made to appear, however, that this course is more to the interest of the creditors and stockholders than the appointment of a receiver would be.[3]

Section 432. **Further of the Dissolution of the Corporation by the Appointment.**— Although, upon the appointment of a receiver, the corporation is enjoined from the exercise of its corporate franchises and deprived of its property, and thereby becomes, for the practical purposes of its creation, non-existent, it, nevertheless, cannot be held to be actually dissolved until it is so adjudged and determined by judicial sentence. Its stockholders continue their existence *qua* stockholders, and its contracts may be enforced against it.[4] The existence of the corporation is not destroyed, or suspended, by the action of a court of equity in taking possession of its property and franchises, and it may be sued upon all causes of action upon which it may be or become liable *in personam*, no license from the court being a condition precedent to the bringing of such actions; but a judgment thus obtained cannot be satisfied from property in the hands of the receiver, except through the administering assistance of the court appointing him. After the property is returned to its custody the judgment can be enforced against it in the usual way, on final process.[5] The charter of the Frankfort Bank of Maine was repealed by an act of the legislature, and receivers appointed to distribute its funds. It was in this case, however, held that the bank was thereby incapacitated from suing or being sued in a court of law, otherwise than to promote the objects of the receivership.[6]

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[1] Oakley v. Paterson Bank, 2 N. J. Eq. 173; Nichols v. Perry Patent Arm Co. 11 N. J. Eq. 126.

[2] Rawnsley v. Trenton Mutual Life and Fire Ins. Co. 9 N. J. Eq. 347.

[3] Nichols v. Perry Patent Arm Co. 11 N. S. Eq. 126.

[4] Slee v. Bloom, 19 Johns. 456; Kincaid v. Dwinelle, 59 N. Y. 552; Pringle v. Woolworth, 90 N. Y. 510; Moseley v. Burrow, 52 Texas, 396.

[5] Heath v. Missouri, Kansas & Texas Ry. Co. 83 Mo. 617.

[6] Whitman v. Cox, 26 Me. 335. See also Leathers v. Shipbuilders' Bank, 40 Me. 386.

Section 433. **Parties to the Suit for the Appointment of a Receiver.**—To every such action the corporation is a necessary party, and, in its absence, the court will refrain from decreeing a dissolution and decline to appoint a receiver;[1] and this is the true rule, although it is alleged not to be a corporation proper, but only a partnership. The omission to join the corporation as a defendant is such defect as may be taken advantage of by a stockholder on a writ of error.[2] A receiver of a bank appointed under the Michigan statutes in a proceeding instituted by one of its creditors, is not a necessary party to a subsequent proceeding commenced by another creditor, charging that the bank was only a pretended corporation, and praying for the appointment of a receiver.[3] Neither is a party who has transferred his stock and parted with his entire interest in the corporation and its effects, entitled to have a receiver appointed upon the ground of the official mismanagement of the trustees of the company.[4] Where receivers are appointed they need not be made parties to a bill to foreclose a mortgage against the corporation, which was taken *pro confesso*,

[1] Gravenstine's Appeal, 49 Pa. St. 310; Mickels v. The Rochester City Bank, 11 Paige, 118.

[2] Baker v. Administrator of Backus, 32 Ill. 79.

[3] Wheeler v. Clinton Canal Bank, Harring. (Mich.) 449.

[4] Smith v. Wells, 20 How. Pr. 158. An insurance company, organized on the mutual system, was authorized, for the better security of its debtors, to receive notes for premiums in advance from persons intending to receive policies and to negotiate such notes for the purposes of their business. On the amount of such notes above the premiums paid by the makers, and on new notes taken thereafter, a compensation was to be allowed by the trustees of the company, at a rate not exceeding five per cent to be fixed by them. There was no capital stock. A made his note for $5,000 to the company under the above provisions of their charter. At the end of a year a surplus was earned and divided among those who had become members by insuring in the company, but no compensation was made to those who had given their notes as above provided. A filed a bill for an injunction and the appointment of a receiver. Held, that as A, by making his note as provided by the charter, was neither a creditor nor stockholder within the statute regulating the dissolution of corporations, though he might be entitled to some compensation, he could not maintain his bill for an injunction and receiver. Hill v. Nautilus Insurance Co. 4 Sandf. Ch. 577. It seems that so far as proceedings for dissolving banking corporations and appointing a receiver are governed by special statutes, the statute 1 Rev. Stat. 239 should govern. Herron v. Vance, 17 Ind. 595. *Quære*, whether, in view of 1 Rev. Stat. 159, and 239, averments could be made by a receiver of a banking corporation, showing authority within the three years named, to prosecute or defend suits in his own or in any other name than that of the corporation; Herron v. Vance, *supra*.

before the receivers were appointed, and who do not apply for leave to come in and defend.[1]

Section 434. **Statutes Authorizing the Appointment — Construction — Illustrations.** — Under the New York code of civil procedure, an action to procure a judgment dissolving a corporation, created by or under the laws of that state, may be maintained, and receivers of its property appointed, in any of the following cases:

1. Where the corporation has remained insolvent for at least one year.

2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.

3. Where it has suspended its ordinary and lawful business for at least one year.

4. If it have banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.[2]

Some of the other states of the Union have similar statutory provisions; and have made some or all the above mentioned acts and omissions grounds for the forfeiture of corporate franchises and the appointment of receivers. In proceedings for the voluntary dissolution of corporations under statutes, as well as in suits brought by judgment creditors for the sequestration of corporate property, receivers are, in most of the states, authorized to be appointed. The power of appointment is usually made discretionary, and when discretionary it will be exercised with extreme caution. In a proceeding against the Franklin Bank[3] a receiver was appointed upon the petition of a creditor, the bank having failed to show cause. So, also, in a judgment creditor's action brought for sequestration of the corporate property, on the filing of a petition, duly verified, showing the recovery of a judgment against the corporation, the issuing of execution thereon to the proper county, and the return thereof unsatisfied, an order was granted that the corporation show cause why the prayer of the petition should not be granted; and in the meantime, the officers of the company were restrained from transferring or incumbering the property of the corporation.[4] Where

[1] Willink v. Morris Canal & Banking Co. 4 N. J. Eq. 377.

[2] New York Code of Civ. Proc. sections 1785, 1788.

[3] 1 Paige, 85.

[4] Devoe v. Ithaca & Owego R. R. Co. 5 Paige, 521; Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57.

an insurance company, pursuant to a vote of its directors, issued no new policies and employed no clerks or agents for a year, it was held, although the officers of the company were regularly elected, that it had suspended its ordinary and lawful business within the meaning of the act, and was thereby dissolved, and a receiver was appointed.[1]

In the case of Conro v. Gray,[2] it appearing that the company had ceased to transact business as a corporation, that the principal stockholders had dealt with the corporate property as their own, and that the president, in violation of his trust, had made an assignment of its property, the court declared that, under the circumstances, there was no remedy for the creditors but to file their bill and ask for a receiver.

In Illinois a somewhat similar case arose.[3] The company had not only ceased to do business, but it was practically unable to resume on account of its insolvency. This having been brought about by the fraudulent mismanagement of its directors, the court transferred the property to the management of a receiver.[4]

In the Matter of the Empire Bank,[5] the question arose whether the bank was, in the language of the statute, "not clearly solvent." The court decided it was clearly insolvent, because: (*a*) It had suspended specie payments. (*b*) Before such suspension, it was borrowing money frequently and in large amounts, at an exorbitant rate of interest. (*c*) It had refused to pay its undisputed debts for more than twenty days after demand. (*d*) It had permitted judgments against it to be recovered and executions to be issued and to be returned unsatisfied. (*e*) It had allowed an injunction against its business to be issued and when that, in a compromise with its creditors, was supposed to be dissolved, it immediately executed, without security, to three individuals — two of them, at least, debtors to the institution and selected by the directors, who were also debtors — an absolute assignment of all its property and effects, to the nominal amount of nearly half a million, to pay its creditors. The court declared the assignment void, saying: "Whatever may be the meaning of the word insolvency in other connections and in other statutes, its meaning, in the statute before us, can admit of no dispute, and that meaning, it is obvious, is

[1] *In re* Jackson Marine Ins. Co. 4 Sandf. Ch. 559.

[2] 4 How. Pr. 166.

[3] Coal Mining Co. v. Edwards, 103 Ill. 472.

[4] *Cf.* Streit v. Citizens' Fire Insurance Co. 29 N. J. Eq. 21, where the defendant had ceased to do business.

[5] 10 How. Pr. 498.

nothing more nor less than inability or unwillingness to pay promptly, as indicated by actual non-payment, persisted in or continued for ten days after demand or for any time after execution." The appointment of a receiver followed as of course.[1]

Section 435. **In Cases of Insolvency Under Statute.** — It becomes the imperative duty of the court to make the appointment in cases where the officers, after the insolvency of the company, have improperly and fraudulently disposed of its property.[2] Where a statute makes it the duty of the attorney-general of the state, whenever a bank becomes insolvent, to apply to a court of equity for an injunction and a receiver, and for the winding up of the corporation, when the fact of the insolvency is established, the court to which the application is addressed has no discretion as to the appointment, but a receiver will be granted as of course.[3] Where the statute provides that a receiver may be appointed when a corporation has been dissolved, or when it "is in imminent danger of insolvency, or has forfeited its corporate rights," in proceedings against an insurance company for the appointment of a receiver, it is sufficient ground for the relief to allege that the company is insolvent, and that its officers have misapplied the funds and are wasting the only means of the company for the payment of losses. Such a predicament of fact, if it does not show an absolute condition of insolvency, shows at least that there is such "imminent danger of insolvency" as to warrant the appointment of a receiver; and the facts alleged being sufficient to give the court jurisdiction, its proceedings in making the appointment, even if erroneous, cannot be called in question in a collateral proceeding.[4] Neither is it necessary that the information by the attorney-general be verified by a positive affidavit of the insolvency of the bank, but it is sufficient if there is an allegation on information and belief, since no person but the officers of the bank could swear positively as to its insolvency.[5] And in an action by stockholders to set aside a mortgage executed by the officers of the company without adequate consideration and in fraud of the rights of the company, a receiver, *pendente lite*, may be appointed.[6]

The system inaugurated in New York by the act of 1825, and in-

[1] See further upon the subject of this section, section 423.

[2] Nichols v. Perry Patent Arm Co. 11 N. J. Eq. 126.

[3] Attorney-General v. Bank of Columbia, 1 Paige, 511.

[4] Howard v. Whitman, 29 Ind. 557.

[5] Attorney-General v. Bank of Columbia, 1 Paige, 511.

[6] Avery v. Blees Manufacturing Co. 27 N. J. Eq. 412.

corporated into the revised statutes, has been continued by the codes. For fifty years, prior to the act of 1883, it was the statutory system of procedure for the winding up of the affairs of insolvent corporations, through receivers appointed by the court, not by virtue of its inherent jurisdiction, but under statutory authority. This statute, which authorizes their appointment and also prescribes with great minuteness their powers and duties, has not been repealed.[1]

Section 436. **Power to Appoint in Foreclosure Cases.** — The power of a court of chancery to appoint a receiver, *pendente lite*, in foreclosure cases, is a part of its incidental jurisdiction, not depending upon any statute, which it exercises whenever, by reason of the insufficiency of the security, or other reason, equity requires that the rents and profits of the mortgaged property, pending the litigation, should be impounded and retained, to be applied upon the debt to be ascertained by the final judgment. This authority is not affected by the character of the mortgagor, whether an individual or a corporation. It rests upon grounds quite independent of the character of the parties to the instrument or the nature of the mortgaged property.[2]

Section 437. **The Appointment as Incident to a Creditor's Bill — Sequestration.**—A creditor who files a bill for the sequestration of the corporate property and the appointment of a receiver is generally required by the statute authorizing the action to show that he has exhausted his remedy at law, by proving that he has obtained a judgment against the company and that an execution issued thereon has been returned unsatisfied in whole or in part.[3] This proof is required by statute in New York;[4] and a creditor who has not obtained a judgment cannot succeed in an application for a receiver, although he prove that the corporation is insolvent and is suffering other creditors to obtain a preference.[5] In Wisconsin a judgment creditor can file a bill on behalf of himself, and of all other creditors similarly situated, who may elect to come in, and the officers and delinquent members of the company will be required to pay and account to the receiver for so much of the

[1] United States Trust. Co. v. New York, West Shore, etc., R. R. Co. 101 N. Y. 478, 484 (1886).

[2] United States Trust Co. v. New York, West Shore, etc., R. R. Co. 101 N. Y. 478, 483 (1886).

[3] Hinckley v. Pfister, 83 Wis. 64; Towle v. American Building, Loan & Investment Society, 60 Fed. R. 131.

[4] Dambman v. Empire Mill, 12 Barb. 341. See also Bangs v. McIntosh, 25 Barb. 591.

[5] Galway v. United States Steam Sugar, etc., Co. 13 Abb. Pr. 211.

capital stock as will be necessary to pay any judgment in the action. The funds recovered will be divided ratably among the creditors who have become parties.[1] In an early case in New York, a creditor of a banking association, who sought the appointment of a receiver to wind up its affairs, was relegated to the courts of law, as it was apparent from his bill that whatever rights he had were cognizable at law and might be remedied by following the course pointed out by law for that purpose.[2]

It is about time courts were breaking away from the very unreasonable rule requiring, as a condition precedent to the right of a judgment creditor to ask for the appointment of a receiver in assistance of his judgment, that he first have execution issued and returned unsatisfied. Where it can be shown that the defendant has no property subject to levy of an execution, and that to issue the writ would be wholly without avail, it cannot be perceived why such a rigid and unreasonable rule should ever have been adopted, or continued in force. The rule violates the maxim, the law does not require the doing of an unnecessary thing.

It is noted with pleasure that one court has declared against the rule, where it was alleged and shown that to have issued the writ would have accomplished nothing for the judgment creditor.[3]

It has been held that where a statute authorizes the appointment of a receiver because of the insolvency of a corporation a creditor may petition for the receiver without first reducing his claim to judgment.[4]

Section 438. **The Appointment in a Creditor's Action in New York.**—A creditor of a corporation obtained judgment against it in the state wherein it was organized, and in aid of his judgment procured the appointment in that state of a sequestrator of its property. The corporation transferred its property and assets to a new corporation created under the laws of New York, upon the sole consideration of shares of stock in the new company, and, in an action brought in New York by the creditor upon his judgment, a receiver was appointed.[5] Under the provision of the revised statutes of New York authorizing a creditor of an insolvent corporation to proceed by petition for the appointment of a receiver, the

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[1] Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57.

[2] Parmly v. Tenth Ward Bank, 3 Edw. Ch. 395.

[3] Harmon v. Wagener, 33 S. C. 487.

[4] San Antonia & Gulf Shore Rail-Road Co. v. Davis (Tex. Civ. App.) 30 S. W. R. 693.

[5] Barclay v. Quicksilver Mining Co. 9 Abb. Pr. (N. S.) 283; s. c. 6 Lans. 25.

creditors may proceed by bill, as in the ordinary case of a creditor's suit for the benefit of all the creditors.[1]

Section 439. **Of Religious Corporations.**— From the fact that there are but a few cases in the reports involving a receivership of a religious corporation, it may be assumed that the courts are not often called upon to appoint a receiver in such a case. It is, however, settled law that the chancellor has jurisdiction over religious corporations, so far as their property and temporalities are concerned, upon the principle of trusteeship.[2]

If trustees of a religious corporation, having the control of its temporalities, misapply the funds or abuse the trust reposed in them by the corporators, or those for whose benefit they hold the property, the supreme court in New York has, at common law, power to compel them to account for such misapplication, notwithstanding the provision in the revised statutes excepting religious incorporations from the visitorial power which is expressly given in relation to ordinary corporations.[3] Except in connection with the property and temporalities of a religious society, whether incorporated or not, and upon the principle of trusteeship, the court has no jurisdiction and cannot interfere. It has nothing immediately to do with their spiritual concerns, church government, discipline, faith, doctrines or modes of worship. These are matters which are to be left to the regulation of their own peculiar tribunals and the ecclesiastical judicatories of each church. Nor will the court interfere to restrain the free exercise of religion in any man according to the dictates of his own conscience. It disclaims all such power

[1] Morgan v. New York & Albany R. R. Co. 10 Paige, 200. The plaintiff may pray a discovery of such stockholders as have not paid in the full amount of their shares of the stock, as fixed by the charter; and upon obtaining the discovery may amend his bill by making such stockholders parties; or he may wait until a decree has been rendered and the corporate effects have been distributed, and then file a supplemental bill against such stockholders for the amount due on their respective shares, or so much thereof as is necessary to satisfy the residue of the corporate debts. The manner in which the effects of an insolvent corporation will be distributed, under a decree obtained in a creditor's suit by a judgment creditor of the corporation, is the same as that prescribed by the statute in relation to the voluntary dissolution of corporations. Where, in a creditor's suit against an insolvent corporation, there was nothing before the court to show that any other debts were owing by the corporation beside the plaintiff's, the appointment of a receiver of so much of the property as would pay the plaintiff's debt was sustained on appeal by the defendant; Morgan v. New York & Albany R. R. Co. *supra*.

[2] Bowden v. McLeod, 1 Edw. Ch. 588.

[3] Baptist Church in Hartford v. Witherell, 3 Paige, 296; Bowden v. McLeod, 1 Edw. Chan. 588.

and authority. And yet, it must be admitted, that there are cases in which the court has power to inquire into tenets openly and publicly expressed, in reference to the place in which they are promulgated.[1]

In the case of Bowden v. McLeod[2] the church was divided into two parties; each one was trying to get possession and an attempt was made to install a particular minister, who was obnoxious to the complainants. The cause was left open, to give time for a decision of the higher judicatories of the church upon a turning point. In the meantime the court interfered, by ordering each party to use the church alternately, the vice-chancellor saying: "And, if necessary, a receiver of the income and pew-rents can be appointed, to be held subject to the further order of the court." This cause was settled by the parties, while it was in the court of errors, after the injunction had been dissolved by the chancellor on technical grounds.

And again, in Willis v. Corlies,[3] where a motion was made for a receiver of real estate before answer, and the subject-matter of the controversy was the real estate belonging to the Society of Friends in the city of New York, the application was refused, because there was evidence neither of fraud nor danger to the property.

Section 440. **Of Foreign Corporations.**—Section 1812 of the New York code of civil procedure extends the authority which it confers upon courts of equitable jurisdiction to corporations and joint-stock associations created by or under the laws of other states, or countries, "where the corporation or association does business within the state or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock."[4]

The propriety of the relief against foreign corporations is sometimes determined by the legislation or decisions of the state in which the association was incorporated. Thus, in an action brought by holders of the original stock of a corporation created by the laws of another state, to set aside an increase of stock made by the corporation, it is not lawful to grant an injunction against the action of the corporate officers and to appoint a receiver of the new issue, when the state in which the company was incorporated has, by legislative action and by the decision of a court of last resort,

[1] Bowden v. McLeod, *supra*.
[2] 1 Edw. Chan. 588.
[3] 2 Edw Chan. 281.
[4] DeBemer v. Drew, 57 Barb. 438; Murray v. Vanderbilt, 39 Barb. 140.

ratified the acts of the corporation in issuing the new stock and declared it legal.[1]

The superior court of New York is so limited in its jurisdiction that it cannot appoint a receiver of the property or effects of a foreign corporation for the purpose of winding up its affairs.[2]

A court in one state may appoint a receiver for a corporation organized in another state, but doing business and having property in the former.[3]

Section 441. **When Appointment will be Made — Cases Where the Application Has Been Denied Under Statutory Provisions.** — As a general rule the appointment will not be made upon an *ex parte* application, and the statutes usually give the corporation an opportunity to be heard, and prescribe that an order to show cause shall be first issued and made returnable at some definite period of time thereafter;[4] nor should an appointment be made where the affidavits state the facts upon information and belief.[5] Thus, in a case where the insolvency of a bank was averred upon information and belief, and the contrary was shown by the official reports of the bank, made and sworn to pursuant to the banking laws of the State of New York, the receiver was refused.[6] And the same rule applies where the applicant alleges, in general terms, that he believes a particular bank to be insolvent and unable to pay its debts, without stating the facts and circumstances upon which the belief is founded.[7] Upon the same principle the application was refused in proceedings under the statute of New Jersey, where the affidavits, read in support of the motion, contained only general allegations as to the belief of the party that great frauds had been committed, but contained no statement of the facts constituting the fraud and did not specify the parties charged with their commis-

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[1] O'Brien v. Chicago, Rock Island & Pacific R. R. Co. 53 Barb. 568.

[2] Day v. United States Car Spring Co. 2 Duer, 608. The provisions of the Code of Procedure of the State of New York (section 292) have no relation to insolvent corporations. The provisions of the Revised Statutes (2 R. S. 463) are preserved by section 471 of the code, and must govern proceedings supplementary to execution against insolvent corporations. Hammond v. Hudson River Iron and Machine Co. 11 How. Pr. 29.

[3] Holbrook v. Ford, 153 Ill. 633; affirming s. c. 50 Ill. App. 547.

[4] Devoe v. Ithaca & Owego R. R. Co. 5 Paige, 531. See, also, People v. Albany & Susquehanna R. R. Co. 7 Abb. Pr. (N. S.) 290.

[5] Livingston v. Bank of New York, 26 Barb. 304; s. c. 5 Abb. Pr. (N. S.) 338. See also Powers v. Hamilton Paper Co. 60 Wis. 23.

[6] Livingston v. Bank of New York, 26 Barb. 304.

[7] Bank of Columbia v. Attorney-General, 1 Paige, 511; s. c. 3 Wend. 588,

sion.[1] If no fraud and no threatened destruction or material injury to the property is shown, no case is made out for the court to exercise this summary power.[2] A well-grounded apprehension of injury about to be done must appear. Where the misconduct occurred, if at all, several years before, and no act is at present threatened, nor mischief impending, an injunction and receiver will not be ordered.[3] Where an action was brought to restrain the holders of certain shares of stock from transferring them, it being claimed that the stock had been illegally issued, an *ex parte* application for a receiver of the shares, made before answer, was denied, inasmuch as there was no evidence before the court that the defendants were irresponsible, or were about to transfer the stock and thereby cause a loss.[4]

In proceedings under the statute of New Jersey for a voluntary dissolution a receiver was refused, as it appeared that the directors were winding up its affairs in a manner satisfactory to all the stockholders except the complainant, and were in all respects trustworthy.[5] Where all the capital stock of a manufacturing corporation was owned by two persons, and they disagreed as to the valuation of the property on hand in making the annual statement, and one of them assumed control of the business to the exclusion of the other, it was held, on the application of the one in control, that the condition of the property and the relations of the parties did not warrant the appointment of a receiver.[6] Where a statute required the insolvency of a bank of which a receiver was sought, to be proved as a condition precedent, but was silent as to the manner of proving it, the court declared that it must be proved according to the established rules of evidence and the course and practice of the court, and that, if the facts and circumstances shown were sufficient to make out a *prima facie* case, and were uncontradicted or unexplained by the bank, the application would be granted.[7] The revised statutes of Rhode Island [8] authorizing the court to appoint a receiver of a bank "where it is so managing its concerns that the public, or those having funds in its custody, are in danger of being defrauded thereby," it was held to be unnecessary, in order to authorize the court to act under this statute, to establish an intent on

[1] Oakley v. Patterson Bank, 2 N. J. Eq. 173.

[2] Baker v. Administrator of Backus, 32 Ill. 79.

[3] Keon v. Colt, 5 N. J. Eq. 365.

[4] People v. Albany & Susquehanna R. R. Co. 7 Abb. Pr. (N. S.) 290.

[5] City Pottery Co. v. Yates, 37 N. J. Eq. 543.

[6] Einstein v. Rosenfeld, 38 N. J. Eq. 309.

[7] Sutherland, J., in Bank of Columbia v. Attorney-General, 1 Paige, 511; s. c. 3 Wend. 588.

[8] Ch. 126, section 4.

the part of the managers of a bank to cheat the depositors, but that it was sufficient if it appeared that, through their mismanagement, the bank was exposed to depredations by dishonest agents, and that the depositors were thereby in danger of being defrauded.[1] The fact of past mismanagement, although *ultra vires*, and followed by insolvency, will not be considered upon an application made under this section of the statute, because that would present a case for the interposition of the court upon another and distinct ground.[2] Nor will the court interfere where the insolvent condition of the bank is owing to the mismanagement of a former board of directors, to whom a new board has succeeded, with the approbation and under the supervision of the bank commissioners, with a view to retrieving the condition of the bank.[3]

A receiver will not be appointed of a banking company upon the charge of fraud and corruption in the control and conduct of the election of directors, where there is no charge of fraud or abuse in the ordinary pecuniary concerns of the institutions.[4] In an action against a bank if the court deems it a case for a receiver, and the bank appeals, the court will not appoint a receiver, pending the appeal, where there is no proof that the funds are unsafe in the hands of the officers, especially where the appeal can be speedily decided. Should, however, any interested party show, in the meantime, that something further is required for the safety of the fund, the court might then act.[5]

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[1] Bank Commissioners v. Rhode Island Central Bank, 5 R. I. 12.

[2] Id.

[3] Id.

[4] Ogden v. Kip, 6 Johns. Chan. 160.

[5] The Attorney-General v. Bank of Columbia, 1 Paige, 511. Where the petition stated that the plaintiff was a creditor of the Licking County Bank, a branch of the State Bank of Ohio: that said branch became insolvent, and its assets, real and personal, passed into the hands of the State Bank of Ohio, or board of control, under the act of February 24, 1845, "to incorporate the State Bank of Ohio and other banking companies;" that the defendant was appointed by the State Bank a receiver of the assets of said branch, and took possession of the same, and that, while so possessed, he purchased the assets and received from the State Bank a conveyance of the real estate, and had neglected to sell and convert the assets into money, but held and claimed the same, by virtue of such purchase and conveyance as his own; and where the petition prayed a discovery and account, that a new receiver might be appointed, that the assets might be duly administered under the statute, etc., on demurrer to petition, it was *held*, that the facts stated in the petition did not constitute a cause of action against the defendant; that by section 24 of said Bank act of 1845, the property, real and personal, of the insolvent bank became vested in the State Bank, in trust, for the purposes mentioned in the act, and that the defendant, as receiver, was to be regarded as the ministerial officer or agent of the State Bank, and as acting under its di-

Section 442. **Laches and Acquiescence as a Ground for Refusal.**—In granting or withholding this relief the courts are influenced by the same equitable considerations which govern their decision in cases under the common law jurisdiction. Laches, acquiescense and consent are such counter equities that when they appear the courts have frequently declined to interpose.[1] An illustration of their refusal to interfere under such circumstances, is to be found in the case of Gray v. Chaplin,[2] and another in the case of Hager v. Stevens.[3] In the former case the authorities of a company made an agreement in the matter of a lease of tolls, which it was beyond the power of the company to make. For forty-seven years the lessee and his successors remained in possession and receipt of the tolls under the agreement, and during all that period no objection thereto had been raised by the stockholders. In an action by a stockholder to set aside the agreement upon the ground that it was *ultra vires*, the court declined to appoint preliminarily a receiver of the rents and tolls.[4] In these, as well as in other cases, the complainant must come into court with clean hands. He cannot have a receiver upon the ground that the corporate officers have been guilty of fraud, or misconduct, or breach of trust, if he have himself participated in such wrongful acts.[5] In the latter case it was alleged, in the bill filed by a stockholder, that certain real estate situated in another state, had been purchased with the moneys of the corporation and the title taken in the name of another person, but because the complainant had stood by without assailing the transaction for a number of years, during which period the title remained unchanged, the court refused to appoint a receiver, especially as the title was in no greater danger at the time of the application, than it had been previously, and it not appearing that the trustee of the property was insolvent.[6]

Section 443. **Of Security in Lieu of a Receiver.**— In an action by a creditor seeking to enforce his judgment, against a corporation transacting an extensive business, where large interests were involved, the court allowed the defendant a reasonable time within which to give security in order to avoid the interference of a receiver. The security exacted was a bond with sureties sufficient to

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rection in settling up the affairs of the insolvent bank. Lafayette Bank v. Buckingham, 12 Ohio St. 419.

See section 484 further upon subject of this section.

[1] Kean v. Colt, 5 N. J. Eq. 365.

[2] 2 Russ. 126.

[3] 6 N. J. Eq. 374.

[4] Hager v. Stevens, 6 N. J. Eq. 374.

[5] Hyde Park Gas Co. v. Kerber, 5 Bradw. 132.

[6] Gray v. Chaplin, 2 Russ. 126.

secure the plaintiff in any recovery which he might succeed in obtaining in the action.[1] The case of Stewart v. Chesapeake & Ohio Canal Co.[2] was where the mortgage bondholders of the defendant applied for a receiver, but failed to establish the requisite facts; the court nevertheless retained jurisdiction of the case for the purpose of requiring the company to render accounts from time to time of its receipts and disbursements. In another case it was held not a bar to an action brought by a corporation to recover unpaid subscriptions to its capital stock, that a receiver of the corporation has, since the commencement of the action, been appointed; *a fortiori* where the receiver has taken no proceedings to collect such unpaid subscriptions.[3]

Section 444. **Jurisdiction Over the Assets and Officers of a Foreign Corporation.**— The authority of a state court over the assets situated within its jurisdiction and the resident directors of a foreign corporation, is exemplified and explained in the case of Redmond v. Hoge.[4] We quote from the opinion of Davis, P. J.: "The officers who have complete control of a foreign corporation, now in process of voluntary dissolution, being all residents of this city and having in their possession here, certain funds of the corporation, which their own insolvency has put in jeopardy, and neither they nor the funds being amenable to the jurisdiction of the state under whose laws the corporation was created and exists, refuse to make application of such funds to the creditors and stockholders in conformity to the proceedings for dissolution, or to put the same in a place of safety. They possess, being all the executive and a majority of the administrative officers of the corporation, such power of control, that no suit can be commenced by the corporation itself, to protect the fund. Is a court of equity of a state powerless, at the suit of a minority of the officers, who are stockholders and personally interested in the application and distribution of the fund, to appoint a receivership of the particular fund, and apply it, first to the creditors of the corporation, and, secondly, to the stockholders, in accordance with the proceedings for dissolution in the home state of the corporation? We have clearly jurisdiction of the persons of the officers in the state. We have jurisdiction of the property because it is within our territory. The plaintiffs are also citizens of our state, and show themselves to be remediless both in

[1] Barclay v. Quicksilver Mining Co. 9 Abb. Pr. (N. S.) 283.

[2] 5 Fed. R. 149; s. c. 4 Hughes, 47.

[3] Glenville Woolen Co. v. Ripley, 48 N. Y. 206.

[4] 3 Hun, 171, 176.

Connecticut and in the federal courts. We are not prepared to say, until some higher tribunal shall admonish us to the contrary, that this court has not, under such circumstances, power to intervene, so far as relates to the property actually within the state. The court is not powerless, in such a case, to enforce any judgment it may render, so long as it is limited to the particular fund which it finds here and takes from the hands of persons over whom its jurisdiction is complete and puts it into the safekeeping of its own officers; and we are aware of no authority which denies to us jurisdiction in a case containing all the elements of that before us. It is idle to answer that the courts of Connecticut have jurisdiction over the corporation; for such jurisdiction, so far as it affects the questions and remedies here, is futile. Its impotency was illustrated in the proceeding commenced in the superior court of that state, in which Eaton was appointed receiver, and in which he was forced, in substance, to report that all the assets of the corporation were detained in the City of New York, and that 'he never has had, nor been permitted to have, possession of any of the assets of the said corporation.' A receiver, if appointed there, must resort to our courts to reach the appellants and the funds in their hands, by an action similar to the present, and becomes, substantially, the receiver of this court, in order to acquire possession of the fund. But while no such officer exists in Connecticut, there seems to us no sound reason why the jurisdiction of this court may not be invoked to preserve a fund now in the hands of persons in our jurisdiction, and in danger of being lost by their insolvency or improper use." This action was commenced by a stockholder for an accounting and distribution. But where a foreign corporation has been dissolved in its own state, its existence being continued for certain purposes only, and certain of its property is under the control of its officers, who are residents of New York state, the supreme court of that state will refuse to appoint a receiver of such property upon grounds which would be insufficient in the courts of the state wherein the corporation was located.[1]

Section 445. **The Selection of a Receiver — Eligibility.** — The court may appoint one corporation the receiver of another;[2] and, in New York, a director, trustee or other officer, or a stockholder of the company, may be appointed.[3] Under this statutory authority, the

[1] Hamilton v. Accessory Transit Co. 26 Barb. 46. See also Murray v. Vanderbilt, 39 Barb. 140.

[2] *In re* Knickerbocker Bank, 19 Barb. 602; *In re* Empire City Bank, 10 How. Pr. 498.

[3] N. Y. Code of Civil Proc. section 2429.

court, in one case, appointed the president and the book-keeper, it not appearing that they were responsible for the insolvency of the company.[1] Prior to this enactment, however, it was deemed an indiscretion to place the officer of an insolvent bank in the position of receiver.[2] A receiver can be appointed without any previous reference, and this was done in the case of The Attorney-General v. The Bank of Columbia.[3]

A trust company has been appointed receiver of two banking institutions, where they held the antagonistic positions of debtor and creditor. Thus, the United States Trust Company, having been appointed receiver of the Knickerbocker Savings Institution, brought a suit, as such, against the Knickerbocker Bank, claiming that $115,000 were due by the latter to the former, while the bank disputed $49,000 of that claim. The trust company was subsequently appointed receiver of the bank also, and applied to the court for instructions. The court held that there was no impropriety in making the trust company receiver of both institutions; and that the trust company, as the receiver both of the bank and the savings institution, and thus representing both debtor and creditor, had a right to apply to the court for instructions.[4] It should be explained that the trust company was created by law, for the express purpose, *inter alia*, of meeting such requirements.

By section 62 of the Revised Statutes of Maine, adopted in 1841, the number of receivers to be appointed by the court, to take possession of the property of a bank on application of the bank commissioners, in case they consider the bank unsafe, is left to the discretion of the court, or of the justice by whom the appointment is made.[5]

The court has also a discretion to appoint another person, in the place of a receiver who has resigned or been removed, or may allow two of the three originally appointed, to act without the appointment of another.[6] In State v. Claypool[7] it was held that a receiver of the assets of an insolvent bank, appointed pursuant to the provisions of section 41 of the act of February 24, 1845, cannot, under existing laws, be removed from his office at the pleasure of the state officers by whom he was appointed.[8]

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[1] *In re* Eagle Iron Works, 8 Paige, 385.

[2] Attorney-General v. The Bank of Columbia, 1 Page, 511; s. c. 3 Wend. 588.

[3] 1 Paige, 511; s. c. on appeal, 3 Wend. 588.

[4] In the Matter of the Knickerbocker Bank, 19 Barb. 602.

[5] Wiswell v. Starr, 48 Me. 401.

[6] Wiswell v. Starr, 48 Me. 401.

[7] 13 Ohio St. 14.

[8] See section 34, where the subject of this section is fully treated.

Section 446. **The Force and Effect of the Order.**— The order of appointment need not contain a specific direction to the officers of the corporation to deliver over its assets to the receiver. The duty to do this follows from the order, and if the officers should fail to perform this duty, and should sell the assets, they would be amenable to punishment for contempt of court.[1] The order of appointment operates as a notice to the company's manager that he is superseded.[2] A corporation, put out of possession by a receiver under an order of the court, will be protected by the court against the consequences of such loss of possession, under the liberty to apply.[3]

Where the statutes of a state provide for appointing receivers in proceedings against corporations whose charters have expired, the courts being vested with full jurisdiction for that purpose, and being empowered by statute to make all orders necessary for the enforcement of the trust, and the statute requiring the receiver to divide the fund collected among the creditors *pro rata*, the remedy thus provided is regarded, in effect, as a method of sequestration for the benefit of all the creditors of the corporation. In such a case, attaching creditors of the corporation cannot acquire liens, so as to prevent the receivers from selling the property and applying the proceeds in payment of all the creditors. And the mode of sequestration thus afforded, will be held to take effect as against attaching creditors, although they may have attached before the receivers were appointed, but after the filing of the bill and the issuing of an injunction restraining the corporation from further conducting its affairs.[4] But when a corporation becomes extinct by act of the legislature, its assets being transferred to a new corporation, the courts cannot, upon an *ex parte* application, the new corporation not being made a party to the action, appoint a receiver over the former corporation, it having ceased to exist, and there being no person competent to represent it.[5]

Where the charter of a corporation vests the liquidation in the stockholders, through commissioners appointed by them, and the stockholders consent to the appointment of receivers by the court, at the suit of creditors, the appointment of such receivers will not be disturbed on the appeal of creditors.[6] If the governor of a

[1] Young v. Rollins, 90 N. C. 125.

[2] Reid v. The Explosives Co. (Queen's Bench Div. Feb. 1887); 56 L. J. (Q. B.) 68.

[3] Fripp v. Chard Ry. Co. 21 Eng. Law & Eq. 53.

[4] Atlas Bank v. Nahant Bank, 23 Pick. 480.

[5] Young v. Rollins, 85 N. C. 485.

[6] *In re* Louisiana Savings Bank, etc. 35 La. Ann. 196.

state refuse to appoint a receiver, who is authorized, by statute, to collect the taxes already levied by a municipal corporation whose charter has been repealed, the court will not undertake to compel an appointment by *mandamus*, because the writ will not be issued where it is likely to be nugatory.[1]

Section 447. **Miscellaneous Incidents.**— The revised statutes of New York[2] do not authorize a creditor at large to apply by petition for a receiver of the estate of an insolvent corporation; but it does not follow that he cannot, by a suit to be brought, avail himself of other powers of the court, in respect to corporations. Those powers[3] are not limited to judgment creditors, but may, for some purposes, be exercised in behalf of general creditors.[4] But the attorney-general has power to institute proceedings, in certain cases, for a dissolution of the corporation; and a general creditor may bring a suit, either to restrain the improper exercise of certain powers, or to procure the payment of his debt.[5] Where a plan for the incorporation and consolidation of certain joint stock associations was being carried out, by consent of nearly all the stockholders, under a charter from the legislature, and one of the stockholders, who had previously favored the scheme, sought, by suit in equity, to prevent it, and to compel an accounting, and the winding up of the old companies, it was held, inasmuch as the charges of fraud made in the bill appeared to be baseless, and no harm was likely to ensue to any one from allowing the proceedings to go on, that the motion for an injunction and receiver, *pendente lite*, must be denied.[6] The order of appointment estops stockholders who united in applying for it, from questioning its validity and from assailing

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[1] Loague v. Taxing District of Brownsville, 29 Fed. Rep. 742, 752 (U. S. Circ. Ct. W. D. Tenn. 1887).

[2] 2 Rev. Stat. 463, section 42.

[3] As defined in Art. 2, tit. 4, c. 8, part 3.

[4] Dambman v. Empire Mill, 12 Barb. 341.

[5] Dambman v. Empire Mill, 12 Barb. 341. The instituting of either of these proceedings does not preclude the other, but each creditor may pursue his own remedy according to the circumstances of his case. Where an injunction was issued, on the application of a judgment and execution creditor, against an insolvent corporation, and a receiver was appointed, who was forbidden to do anything in hostility to the rights of any of the judgment and execution creditors, it was held that it ought not to operate as a bar to the appointment of a receiver in another suit commenced by a general creditor, because it was not for the benefit of all the creditors, and because also of the restriction on the powers of the receiver, which withheld the power, which might be essential to the creditors, of inquiring into the validity of demands which claim a preference.

[6] Mills v. Hurd, 29 Fed. Rep. 410 (1887).

an order directing the receiver to sell the corporate assets.[1] If a bill in the prayer for relief unnecessarily asks for the appointment, it is not demurrable on that ground alone.[2]

The court will not permit separate interventions by individual stockholders, with the consequent multiplication of papers and separate amounts for costs and attorneys' fees. The interest of all stockholders are alike and should be presented and attended to without marshalling a host of different lawyers, all advocating the same relief.[3]

Where a receiver is appointed to administer the assets of an insolvent corporation, a creditor not a party to the petition but who has a right to make himself a party if he desires, cannot bring an independent action for the appointment of another receiver, but must seek his remedy in the same court and in the orignal suit.[4]

II.

Of the Administration of the Receivership — Rights, Powers and Duties of Receivers.

Section 448. **Whom the Receivers Represent — Officers of Court.**— A receiver of a corporation, appointed by virtue of some statutory authority, is like a common law receiver, an officer of the court and not of the company.[5] Such a receiver ought to be an indifferent person between the parties to the suit. He is not the representative of either party, and it is his duty to preserve the property, *pendente lite*, for the benefit of the party who ultimately recovers. In this respect a statutory receiver of a corporation is in all respects under the same obligation as a receiver at common law.

It is settled doctrine, says the New York court of appeals, that the receiver of an insolvent corporation represents not only the corporation, but also its creditors and stockholders,[6] and he is bound to care for the interests of both.[7] He does not represent the company, however, to the extent that service of process upon

[1] Battershall v. Davis, 31 Barb. 323.

[2] Wheeler v. Clinton Canal Bank, Harring (Mich.) 449.

[3] Fowler v. Jarvis-Conklin Mortgage Trust Co. 64 Fed. R. 279.

[4] National Bank of Augusta v. Richmond Factory, 91 Ga. 284; s. c. 18 S. E. 160.

[5] *In re* Van Allen, 37 Barb. 225; Manisty, J., in Reid v. The Explosives Co. (Queen's Bench Div., Feb., 1887); 56 L. J. (Q. B.) 68; Gillet v. Moody, 3 N. Y. 479; Talmadge v. Pell, 7 N. Y. 347; Alexander v. Relfe, 74 Mo. 495; Pringle v. Woolworth, 90 N Y. 511.

[6] Attorney-General v. Guardian Mut. Ins. Co. 77 N. Y. 275.

[7] Libby v. Rosencranz, 55 Barb. 217.

his agent will give jurisdiction over the company.[1] On the other hand, it was held in Wisconsin, that, under the statutes of that state, such receivers are agents of the court, appointed for the benefit of the creditors, and, as such, become trustees for them; that their duty is to collect and pay over to the creditors the assets of the company, and that the property received becomes practically the property of the creditors.[2] He holds the title to the property as the successor of the corporation, and as its trustee. He has, however, no interest in, or power over the property embraced in the trust, except such as is conferred by the statute.[3] The creditors and stockholders stand in the position of beneficiaries of the fund in his hands, without reference to the source of his title or the extent of his powers. In controversies with third parties he represents no rights of the creditors and stockholders which the corporation itself could not represent.[4] He succeeds however, under the laws of New York, to the rights of creditors and takes title under them, where conveyances, otherwise valid, have been made in fraud of their rights, and in such cases he holds adversely to the corporation.[5]

Section 449. **Generally of the Receiver's Powers.**—It may be stated as a general rule that, where the statute merely authorizes the court to appoint receivers in certain cases, such receivers may be vested by the court with any of the powers usually conferred upon receivers in equity; but where the statute expressly defines the powers of the receivers which it authorizes to be appointed, they are confined to the exercise of those powers and such others only as are implied. Powers not expressly conferred may be implied from the general object and spirit of the statute, or as incidental to the authority expressly given.[6]

In New York receivers were formerly appointed, in certain cases, directly by the legislature; but, in the execution of their trust, they were subject to the control of the court of chancery. In the matter of the Globe Insurance Company,[7] the chancellor gives directions as to the duties of the receivers in the settlement of the claims of creditors and the distribution of the fund.

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[1] Heath v. Missouri, Kansas & Texas Ry. Co. 83 Mo. 617.

[2] Atchison v. Davidson, 2 Pin. (Wis.) 48.

[3] Curtis v. Leavitt, 15 N. Y. 44.

[4] Curtis v. Leavitt, 15 N. Y. 44. See opinion of Comstock, J., in Alexander v. Relfe, 74 Mo. 495.

[5] Curtis v. Leavitt, 15 N. Y. 44.

[6] Runyon v. F. & M. Bank of New Brunswick, 4 N. J. Eq. 480.

See section 264 as to powers of statutory receivers.

[7] 6 Paige, 102.

In New York the power of a receiver of a mutual insurance company to assess premium notes, is derived wholly from statute;[1] in Indiana it is implied from the necessity of making them, as without such power, he could not settle the affairs of the company.[2] In the absence of evidence to the contrary, the act of a receiver will be presumed to have been authorized. A note, which, as part of the assets of a bank, had come into the hands of its receivers, was transferred by them to a creditor in payment of his claim against the bank. In an action brought upon the note by the creditor against the maker, the court held that the legal title to the note had passed to the plaintiff, there being no evidence that the receivers had been guilty of any fraud, or had no authority to dispose of the property of the banking company.[3] He cannot impeach or disaffirm the authorized acts of the corporation or of its agents,[4] and his appointment in no way changes the contract relations between the corporation and its debtors.[5] If the rule were otherwise, no one could safely deal with a corporation.[6] It is also held that he cannot, in adjusting a loss under a policy, waive a substantial stipulation therein favorable to the company,[7] and that he is as much bound by a settlement which the company was authorized to make, as was the company itself. He cannot, therefore, maintain an action upon a note given for insurance, if the note, previously to his appointment, was, without fraud, surrendered by the company and the policy of insurance cancelled.[8] He cannot plead the statute of usury, it seems, where the corporation itself was barred from pleading it;[9] but he is not bound to disallow a just claim which is barred by the statute of limitations.[10]

A receiver of a bank may properly repay money, placed in a bank as a special deposit, to meet a contingency of the bank which never

[1] Shaughnessy v. The Rensselaer Insurance Co. 21 Barb. 605; Williams v. Babcock, 25 Barb. 109; Thomas v. Whallon, 31 Barb. 172; Sands v. Sweet, 44 Barb. 108; Bangs v. Gray, 12 N. Y. 477, reversing s. c. 15 Barb. 264; Sands v. Sanders, 28 N. Y. 416; Jackson v. Roberts, 31 N. Y. 304; Lawrence v. McCready, 6 Bosw. (N. Y.) 329; Berry v. Brett, Id. 627. See, also, McDonald v. Ross-Lewin, 29 Hun, 87.

[2] Embree v. Shideler, 36 Ind. 423; Tippecanoe Township v. Manlove, 39 Ind. 249.

[3] Atchison v. Davidson, 2 Pin. (Wis.), 48.

[4] Devendorf v. Beardsley, 23 Barb. 656.

[5] Williams v. Babcock, 25 Barb. 109; Bell v. Shibley, 33 Barb. 610; Savage v. Medbury, 19 N. Y. 32; Shaughnessy v. The Rensselaer Insurance Co. 21 Barb. 601.

[6] Hyde v. Lynde, 4 N. Y. 387.

[7] Evans v. Trimountain Mutual Insurance Co. 9 Allen, 329.

[8] Hyde v. Lynde, 4 N. Y. 387.

[9] Curtis v. Leavitt, 15 N. Y. 85.

[10] Sands v. Hill, 42 Barb. 651.

happened.[1] Upon the sale, in foreclosure, of property mortgaged by the corporation which he represents, he may buy in the property, just as the corporation might do under other circumstances.[2]

The receiver of an insolvent corporation may, upon application to the court, be authorized to compromise disputed and doubtful claims against the company, by the allowance of so much of such claims as he may deem just and equitable; and in any case where he may deem it expedient, and for the interest of the creditors and stockholders of the company to do so, to compromise with debtors of the corporation who are unable to pay in full.[3] But he will not be authorized to reinsure for risks underwritten by the company, and to pay the new premium out of the assets of the company. He may, however, refund the unearned premiums, where the insured are willing to receive it and to reinsure for themselves; and, if they are not willing to do so, the insured must take their chance of a ratable dividend in case of a loss.[4]

Receivers appointed by the courts of another state to close up the affairs of a corporation established in that state, cannot maintain a claim to a debt due the corporation from a resident of Massachusetts, as against a subsequent attachment of the same, upon trustee process, by a creditor of the corporation.[5] Where, in such a case, the counsel of the corporation and of the receivers have signed an agreed statement of facts, in which it was stipulated, that, if the claim of the receivers should be disallowed, judgment should be entered for the plaintiff and the trustee charged, and the cause has been submitted on such agreed statement, and judgment given for the plaintiff and affirmed upon appeal in the supreme court, it is too late for the receivers to move for a rehearing, on the ground that a decree had been passed dissolving the corporation before the action was brought.[6]

Section 450. **Further of the Rights, Powers and Duties of Receivers of Corporations Whom They Represent.**— The supreme court of Illinois has said, Schofield, J., dissenting: "Where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors, but shareholders, being

[1] Kinsela v. Cataract City Bank, 4 N. J. Eq. 158.

[2] Jacobs v. Turpin, 83 Ill. 424.

[3] Matter of Croton Insurance Co. 3 Barb. Ch. 642.

[4] Ibid.

[5] Taylor v. Columbian Insurance Co. 14 Allen, 353.

[6] Ibid.

vested by law with the estate of the corporation, and deriving his title under and through it; and that, for purposes of litigation, he takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis, only, can he litigate for the benefit of either shareholders or creditors;" excepting "when acts have been done in fraud of the rights of the creditors but which are valid as against the corporation itself, the receiver holds adversely to the corporation."[1]

"A receiver of an insolvent corporation has no greater rights than the corporation. He is bound by all its legal acts; he is subject to all the rights and equities existing against it, and the liabilities or rights of third parties are not changed by his appointment. He simply takes its place and stands as its representative, being also the trustee for the stockholders and creditors whose rights he may assert if they have been affected by the fraudulent or illegal acts of the corporation."[2]

A receiver is entitled to the custody and control of all property of the insolvent company, and it is the duty of all officers of the company to surrender to him all property belonging to the company as is in their possession or within their control. If the officers conceal the estate it is the duty of the receiver to take steps to ascertain the facts and to invoke the aid of the court in compelling its surrender.[3]

A receiver of an insurance company, appointed under statute, has been held not to be entitled to have transferred to him the securities deposited by the company with the superintendent of the insurance department, in the absence of express statutory authority.[4]

The receiver of an insurance company has no right to require from the superintendent of the insurance department "a surrender of a trust which has been devolved upon him by law. We are entirely clear that the superintendent could not voluntarily transfer the trust, and we are at a loss to find any authority in the courts to compel him to do so." It was said that the securities held by the insurance department could not be demanded by the receiver.[5] The same rule prevails where, under statute, securities are deposited with a trustee for the benefit of policy-holders;[6] and also where,

[1] Republic Life Insurance Co. v. Swigert, 135 Ill. 150.

[2] Bedell v. North American Life Insurance Co. 7 Daly, 273.

[3] Brandt v. Allen, 76 Io. 50.

[4] *In re* Guardian Mutual Life Insurance Co. 13 Hun, 115; People *ex rel.* v. Chapman, 64 N. Y. 557.

[5] Ruggles v. Chapman, 59 N. Y. 163.

[6] *In re* Home Provident Safety Fund Association, 129 N. Y. 288.

under contract with its policy-holders, the company deposits with a trustee a certain sum received from premiums.[1]

The receiver may enforce unpaid stock subscriptions.[2] They constitute a part of the assets of the company. But he cannot institute and prosecute a condemnation proceeding.[3]

The receiver succeeds to all the rights of the corporation.[4] When appointed at the suit of a single creditor or stockholder he takes the whole estate for the benefit of all the creditors.[5] He succeeds to the right of the corporation to prosecute to final judgment a pending action, and to be substituted as the proper party for such purpose.[6]

The receiver may recover unearned dividends paid to a stockholder by the corporation out of its capital.[7] From the opinion in the case cited we submit the following extract, which was an utterance of the court concerning the rights and powers of a receiver appointed in a statutory proceeding to dissolve an insolvent corporation: "The receiver has substantially the same powers and functions as an assignee in bankruptcy or a receiver upon a creditor's bill or proceedings supplementary to execution. He succeeds to the rights of creditors as well as of the insolvent corporation; and has the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf. * * * Everything becomes assets in his hands, and hence in the custody of the law, which were assets as to creditors, as well as what was assets to the corporation. Among the rights which pass to the receiver as the representative of the creditors is the right to recover property conveyed by the corporation in fraud of its creditors, or capital withdrawn and refunded to the stockholders without provision for full payment of the corporate debts. This right of the receiver does not depend upon any express statute granting it, but rests upon the general equitable doctrine that the capital of a corporation is a trust fund for the benefit of its creditors, and that those

[1] *In re* Provident Safety Fund Company, 129 N. Y. 288.

[2] Big Creek Stone Co. v. Seward (Ind.), 42 N. E. R. 464.

[3] Minneapolis & St. Louis Railroad Co. v. Minneapolis & Western Railway Co. (Minn.) 63 N. W. R. 1035.

[4] Davis v. Ladoga Creamery Co. 128 Ind. 222.

[5] Rinn v. Astor Fire Insurance Co. 59 N. Y. 143. It was said in this case that when a receiver of an insurance company is appointed under statute, the rights of all persons claiming to be creditors of the corporation are to be ascertained and determined in the action in which the receiver was appointed. He cannot be called upon to account by any creditor in any other court of the state.

[6] San Antonio & Gulf Railroad Co. v. Davis (Tex. Civ. Ap.), 30 S. W. R. 693.

[7] Minnesota Threshing Manufacturing Co. v. Langdon, 44 Minn. 37.

to whom it has been refunded will be held trustees for their benefit. It follows that a receiver of an insolvent corporation, as the representative of its creditors, can assert many claims against stockholders which the corporation itself could not have maintained." [1]

A receiver appointed in proceedings instituted under the act of Congress of March 3rd, 1887, of the property of the Mormon Church was held to represent not only the corporation, but the government and all who had interests in the property, and might take possession, under an order of court, of property of the corporation assigned in fraud of the government, though such assignment might be good as between the parties thereto.[2]

Where an insolvent corporation purchased the sulphur contents of a lot of ore, the cinders to be the property of the seller, it was held that a receiver appointed before all the ore was burnt must return the unburnt ore to the seller.[3]

Section 451. **As to the Prior Contracts of the Corporation** [4] — **Use of Corporate Seal.**—He may, but is not bound to ratify contracts made by the corporation after insolvency or suspension of business, although such contracts are, by the act, declared void as against creditors.[5] And where an incorporated company deposits certain securities with its creditor, as collateral to an indebtedness due from the corporation, but reserves the option of having such securities considered an absolute payment upon notifying the creditor, and the corporation subsequently passes into the hands of a receiver, the option reserved to the company may be legally exercised by the receiver, who is, for this purpose, to be regarded as the legal representative of the corporation. And when the requisite notice is given by the receiver, it has the effect of making the deposit of collaterals an absolute payment, and thus of cancelling the indebtedness.[6]

Receivers of an insolvent corporation, appointed under a statute authorizing such mode of winding up, may make an assignment of a chose in action due the corporation, without using the corporate seal, since the sale or assignment by the receivers is not the act of the corporate body itself, but rather the act of the receivers opera-

[1] See also Thompson v. Greeley, 107 Mo. 577.

[2] United States v. Church of Jesus Christ of Latter-Day Saints (Utah), 18 Pac. Rep. 85.

[3] Winchester v. Davis Pyrites Co. 14 U. S. C. C. App. 300; s. c. 67 Fed. R. 45; affirming s. c. 64 Fed. R. 664.

[4] For full discussion of this subject see sections 327 and 328.

[5] Suydam v. Receivers of Bank of New Brunswick, 3 N. J. Eq. 114.

[6] Phœnix Iron Co. v. New York Wrought Iron Chair Co. 27 N. J. Law, 484.

ting under the statute, and a sale by the receivers, under a power given them by statute for that purpose, is as effectual to convey the title as if the right of property were vested in them, and such sale need not, therefore, be authenticated by the corporate seal.[1]

Section 452. **Of the Receiver's Power to Compromise Claims.**— The court of chancery in New Jersey will not direct receivers, appointed under the statutes of that state, to compromise claims against the corporation, when it is of opinion that no just claim exists, and especially where the claim has been before adjudged by that court to be void;[2] but the court appointing a receiver over an insolvent corporation may authorize him to compromise disputed and doubtful claims by the allowance of such an amount as he may deem just, or authorize him to submit such claims to arbitration, when this method of settlement is provided by statute.

The court may also empower him, generally, in any case where he may deem it for the interest of the creditors and shareholders, to compromise with debtors of the corporation who are unable to pay in full. And the receiver of such a corporation may allow its officers the amounts due to them for salaries, up to the time of his appointment, as debts to be paid ratably with other demands, no preference being given to the officers.[3]

The authority to settle all claims against the corporation and to allow all demands of whose justice he is satisfied, is limited to such demands as might be enforced by suit or action. He cannot, without the consent of all parties interested, allow any claim which is not a charge upon the trust fund, and where a claim which he has rejected has been sent to a referee, it is the duty of the receiver to continue the defence as long as he deems it available.[4] Accordingly it is the duty of receivers of a corporation appointed under the statute to allow only such claims as are legal and just, and which might have been recovered against the corporation, either at law or in equity.[5] And if the receivers disallow a claim, and referees are appointed, the defence must be managed by or under the direction of the receivers, and it cannot be compromised without their consent.[6] He has the right to settle all claims

[1] Hoyt v. Thompson, 5 N. Y. 320, reversing s. c. 3 Sandf. 416.

[2] Suydam v. Receivers of Bank of New Brunswick, 3 N. J. Eq. 114, 276; Stat. of N. J. of 1829, to prevent fraud by corporations.

[3] *In re* Croton Insurance Co. 8 Barb. Ch. 642.

[4] Attorney-General v. Life & Fire Insurance Co. 4 Paige, 224.

[5] Attorney-General v. Life & Fire Insurance Co. 4 Paige, 224.

[6] Ibid.

against the corporation; and to enable him so to do, he is authorized to examine any person on oath in relation thereto. It is his duty to allow all claims against the corporation, in behalf of persons claiming to be debtors, which he shall be satisfied are justly due; but he should not allow any claim which the claimant could not have recovered against the corporation, either at law or in equity, if he had sued the corporation for its recovery. In this respect, the receiver acts as guardian of the rights of all parties interested in the fund; and he has no right to allow a claim which is not a proper charge upon that fund, without the consent of all who are interested in having such claim rejected. If the receiver disallows the claim, and referees are appointed, although the receiver may permit those for whose benefit the defence against the claim is made to manage that defence, this must be done under the direction of the receiver; and there cannot be a compromise without his consent.[1]

Section 453. **Of the Receiver's Powers as to Actions Pending Against the Company.**—In New York the receiver may move to set aside an attachment on the ground of irregularity;[2] and in Pennsylvania, where a statute invests him with power to defend suits in the name of the corporation, or otherwise, he may be substituted in an action for an attachment begun before he was appointed.[3] This subject is more fully treated in the chapter upon suits by and against the receiver, to which the reader is referred.

Section 454. **Of the Receiver's Power to Institute Actions and Proceedings.**—The receiver acquires, in general, the ownership of all the property which the corporation had at the time of his appointment. This includes all the choses in action belonging to the company.[4] It is sufficient if he alleges generally the making of the decree appointing him; he need not set forth a transcript thereof in his pleading.[5]

The paramount duty of the receiver of an insolvent corporation is to collect its assets and reduce its choses in action to possession, and, with all convenient haste, to make distribution among the

[1] Attorney-General v. Life & Fire Insurance Co. 4 Paige, 226, and see McEvers v. Lawrence, 1 Hoffm. Ch. (N. Y.) 172, 175; Talmage v. Pell, 7 N. Y. 328; s. c. 9 Paige, 410.

[2] Bowen v. The First National Bank, 34 How. Pr. 408.

[3] Pickersgill v. Myers, 99 Pa. St. 602.

[4] White v. Haight, 16 N. Y. 310; Osgood v. Laytin, 48 Barb. 464; s. c. affirmed, 3 Keyes, 521.

[5] Boland v. Whitman, 33 Ind. 46.

creditors and other parties entitled. As owner he may, upon first obtaining leave of court, pursue the same remedies for the recovery or protection of the property and the reduction of the choses in action to possession, as are open to other parties.[1] He may maintain an action against the officers of the corporation for fraudulent disposition of its assets, or loss through their conduct.[2] Under the statutes of New York, as well as under his general powers, he may sue for all the money due to the corporation, and for all property improperly disposed of in violation either of the rights of creditors or of shareholders, for the purpose of paying the debts of the corporation, and dividing the surplus, if any, among the shareholders.[3] He may sue upon a note given for a policy of insurance to the insurance company over which he is appointed;[4] also upon premium notes given to a mutual insurance company.[5] He may recover money out of which the corporation has been defrauded, as, for example, the funds of a bank misappropriated by one of its officers. And in such an action he need not prove special damage to any creditor or stockholder, nor need he make a tender, before suit, of the shares of stock given as security for the property converted.[6] He may maintain trover for the conversion of the personal property of the corporation before he was appointed receiver.[7]

In Vermont a receiver of a bank can compel the state treasurer, by *mandamus*, to pay to him from the bank fund a sum sufficient to discharge the excess of the bank's indebtedness beyond its effects, provided such fund is large enough. But the writ should not require payment of any money of the state, nor any money of the treasurer, on account of his having wrongfully made payments from the fund.[8] He may bring actions to recover the property of the corporation after it had ceased to exist by expiration of its charter.[9] It is not only within his power, but it is his duty, to collect

[1] See the cases cited in the following notes, and also Shaughnessy v. The Rensselaer Insurance Co. 21 Barb. 605; Stark v. Burke, 5 La. Ann. 740; New Orleans Gaslight Co. v. Bennett, 6 La. Ann. 457; Gaslight & Banking Co. v. Haynes, 7 La. Ann. 114.

[2] Porter v. Sabin, 36 Fed. R. 475; Thompson v. Greeley, 107 Mo. 577.

[3] Osgood v. Laytin, 48 Barb. 464.

[4] White v. Haight, 16 N. Y. 310.

[5] Van Buren v. Chenango Mutual Insurance Co. 12 Barb. 671; Lawrence v. McCready, 6 Bosw. (N.Y.) 329; Berry v. Brett, Id. 627.

[6] Hayes v. Kenyon, 7 R. I. 136.

[7] Gillet v. Fairchild, 4 Denio, 80; Terry v. Bamberger, 14 Blatchf. 234; Brouwer v. Hill, 1 Sandf. Ch. 629, where a promissory note due to the corporation was converted before his appointment.

[8] Receiver of Danby Bank v. State Treasurer, 39 Vt. 92.

[9] Asheville Division No. 15 v. Aston, 92 N. C. 578.

all the debts due the company, unless he is, by order of the court appointing him, excused from so doing.[1] He has no power to institute a condemnation proceeding.[2]

Section 455. **Of the Receiver's Power to Attack Fraudulent Transfers.**[3] — In some states the receiver of the property and franchises of an insolvent corporation can, by authority of statute, disaffirm and treat as void, assignments and transfers of the corporate property, made in fraud of creditors and the other beneficiaries whom he represents. This is an innovation upon the common law rule which estops an assignor, and his successors, from assailing an assignment made for a fraudulent purpose.[4] Under the laws of New York a payment, or transfer, made when a corporation is insolvent, or made in contemplation of insolvency which actually ensues, with intent to give a preference, is void; and in such a case a receiver is not required to prove open and avowed insolvency at the time of the payment or transfer; nor that the creditor knew the pecuinary condition of the corporation.[5] And, in the same state, a receiver of an insolvent banking association, or corporation, may repudiate the illegal transfer of its securities by its officers, and claim them as part of the fund, as well as assert his right thereto when otherwise affected by the fraudulent and illegal acts of the institution.[6]

Receivers of the property and effects of corporations, and associations in the nature of corporations, not being moneyed corporations, had, in New York prior to the act of 1858, chapter 314, no greater or other powers than receivers in ordinary creditors' suits.[7] In Gillett v. Moody,[8] where certain securities of the company had been illegally transferred to a stockholder in exchange for his stock, an action by the receiver to set aside the transfer was successfully

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[1] Van Buren v. Chenango Mutual Insurance Co. 12 Barb. 671.

See chapter upon suits by receivers.

[2] Minneapolis & St. Louis Railroad Co. v. Minneapolis & Western Railway Co. (Minn.), 63 N. W. R. 1035.

[3] This title considered fully in section 298.

[4] Attorney-General v. Guardian Mut. Ins. Co. 77 N. Y. 275; Gillett v. Moody, 3 N. Y. 478; Talmadge v. Pell, 7 N. Y. 328; Laws of New York, 1858, ch. 314; Tuckerman v. Brown, 33 N. Y. 297; Van Cott v. Van Brunt 2 Abb. (N. C) 283; s. c. 82 N. Y. 535; Brouwer v. Appleby, 1 Sandf. Ch. 158; Brouwer v. Hill, 1 Sandf. Ch. 629. But he represents only *bona fide* creditors; McParland v. Bain, 26 Hun, 88.

[5] Brouwer v. Harbeck, 9 N. Y. 589, reversing s. c. 1 Duer, 114.

[6] Gillett v. Moody, 3 N. Y. 479; Talmadge v. Pell, 7 N. Y. 347.

[7] Mann v. Pentz, 3 N. Y. 415, and see also Hoyt v. Thompson, 3 Sandf. Super. Ct. 416.

[8] 3 N. Y. 479.

maintained. And, in Butterworth v. O'Brien,[1] where the president of a bank had drawn out and fraudulently used moneys of the bank, for which he had substituted fictitious notes, the possession of the notes by the receiver was held presumptive evidence that the money had not been repaid, and it was held that an action upon the notes by the receiver would lie.

In Gillett v. Phillips,[2] a bank, while in a state of insolvency, made illegal transfers of certain notes held by it to one of its directors who knew of its insolvency; the director was not allowed to counterclaim the amount which he had actually paid for the notes. So also, in Vail v. Hamilton,[3] where a mortgage had been given without the assent of the requisite number of the stockholders, an action by the receiver to set it aside was sustained. Within the exception come cases where dividends have been declared and paid, in contravention of the statute. In another case the receiver of an insolvent insurance company successfully maintained an action against the stockholders who received illegal dividends. It appeared that their payment impaired the capital of the company, and that the funds so misappropriated were required to satisfy its debts. The point was made that the right of action was in the creditors and not in the receivers, but the court decided in favor of the receiver.[4]

After the appointment of a receiver, a judgment creditor may bring an action to set aside a fraudulent transfer of the property of the corporation, if the receiver has omitted, or refused, to bring such an action.[5]

The right of a receiver of a corporation to maintain an action against the corporate officers for fraudulent disposition of its property is declared to be a right of the corporation, to which the receiver succeeds.[6]

In Illinois it has been held that a receiver can bring suit to set aside a transaction binding upon the insolvent over whose estate he was appointed in the following cases: First, where the receiver by force of some statute can act for the creditors; second, where the act complained of is *ultra vires*, not binding upon the corporation; third, where the receiver was appointed in a proceeding prosecuted

[1] 24 How. Pr. 438.

[2] 13 N. Y. 114.

[3] 85 N. Y. 453, affirming s. c. 20 Hun, 355.

[4] Osgood v. Laytin, 48 Barb. 464; s. c. 3 Keyes, 521. But see, *contra*, Butterworth v. O'Brien, 24 How. Pr. 438.

[5] Monitor Furnace Co. v. Peters, 40 Ohio St. 575. See further the chapter upon suits by and against receivers.

[6] Porter v. Sabin, 149 N. Y. 473; Thompson v. Greeley, 107 Mo. 577.

by creditors supplemental to execution, the receiver having the rights of the creditors at whose instance he was appointed; fourth, where the receiver sues for property or assets that belong to the debtor. "We think," said the court, "the tested weight of authority sustains the rule in respect of the powers of receivers, where there has been no enlargment of their powers by legislative enactment, that they have such rights of action only as were possessed by the persons or corporations upon whose estates they administer." The petition was filed by the receiver of an insurance company for direction of the court in the matter of a juggling of stock by the stockholders, surrendering unpaid stock and taking paid up stock instead. The court authorized the receiver to institute such proceedings as might be proper to the subscribers to the stock and stockholders of the company.[1]

It is declared in Indiana that after the appointment of a receiver of a corporation he alone has the right to sue to set aside a fraudulent conveyance made by the debtor.[2] In New York a receiver may be authorized by the court to sue to set aside such a conveyance.[3]

The contrary has been asserted by the supreme court of Illinois, where it is held that the rights of a receiver are no greater than those of the defendant; and as the latter would be estopped from setting up and profiting by his own fraud, a receiver cannot attack a fraudulent conveyance made by the defendant.[4]

In Wisconsin it has been held that in a judgment creditor's proceeding the receiver has power to maintain an action to set aside a fraudulent conveyance made by the judgment debtor.[5] The right of a receiver to attack a conveyance made by the debtor is recognized in Minnesota.[6]

This subject is considered at length in a previous section.[7]

Section 456. **Of the Receiver's Power in Reference to Illegal Preferences.**—Mutual insurance companies are embraced in the provisions of the New York Revised Statutes relating to insolvent corporations; and where one gave his notes as a loan of that kind to a company, with the agreement that he should always have sufficient collateral security, and among the securities was a note,

[1] Republic Life Insurance Co. v. Swigert, 185 Ill. 150.

[2] National State Bank v. Vigo County National Bank, 40 N. E. R. 799.

[3] Buckley v. Harrison, 31 N. Y. S. 999.

[4] Gottlieb v. Miller, 154 Ill. 44; s. c. 39 N. E. R. 992.

[5] Weber v. Weber, 63 N. W. R. 757.

[6] Minnesota Threshing Manufacturing Co. 44 Minn. 37.

[7] Section 298.

which the president endorsed to the lender just before the insolvency of the company, the receiver releasing all claims upon it, it was held that it was a preference in favor of a particular creditor, which vitiated the transfer, and that the release of the receiver did not heal the defect.[1]

A stockholder in an insolvent corporation is not entitled to an injunction against the receiver, to restrain him from proceeding to obtain a decree against such stockholder, for the payment of the balance due from him upon the shares of stock held by him, on the ground that, if all the solvent stockholders should pay their ratable proportions, the whole amount would not be wanted to pay the debts of the corporation; but the receiver should collect the balances due, and, in case of any surplus remaining, after paying the debts and the expenses of executing the trust, it must be distributed among the stockholders who have paid in full for their stock.[2]

Section 457. **Of the Receiver's Power to Collect Unpaid Subscriptions.**—Authority given to receivers to sue for and recover any sum remaining due upon subscriptions to the capital stock, is merely a cumulative remedy,[3] the rule being the same whether the stock be held by an original stockholder or by an assignee. In a leading case, the legislature of Georgia having recognized and ratified the appointment of a receiver, or assignee, made with the consent of the stockholders of a corporation before forfeiture of their charter, it was held that the duty of calling in the unpaid stock to discharge debts devolved upon the trustee,[4] and that if the trustee, fraudulently combining with the stockholders, neglected or refused to do his duty, the proceeding might be maintained directly by the creditor in his own name against the stockholders, the receiver being made a party defendant.[5]

In Maryland, it has been decided that, where receivers are appointed for an insolvent corporation, under an order of a court of chancery, with authority to collect unpaid installments from stockholders, such receivers possess the powers which are given by the charter of the corporation to the directors in such cases, both in respect to the time of payment and the amounts to be called in;[6] and that an order of court directing the receivers of an insolvent corporation to give sixty days to the stockholders to pay the re-

[1] Furniss v. Sherwood, 8 Sandf. Super. Ct. (N. Y.) 521.
[2] Pentz v. Hawley, 1 Barb. Ch. 122.
[3] Mann v. Currie, 2 Barb. 294.
[4] Hightower v. Thornton, 8 Ga. 486.
[5] Hightower v. Thornton, 8 Ga. 486.
[6] Hall v. United States Ins. Co. 5 Gill. 484.

maining installments, does not require them to call for the whole amount at one time, upon sixty days notice, but leaves the receivers the power of fixing the amount of the several installments called for, in conformity with the provisions of the charter of the company. In an action of this character against a shareholder, the defendant cannot question the regularity or propriety of the receiver's appointment.[1]

A resolution of a company that there shall be no further call on shares, will be void as against a receiver appointed after its insolvency.[2] It is the duty of the receiver of an insolvent corporation, to call upon the stockholders to pay the balances due upon the shares of stock held by them respectively, where he has reason to believe the whole amount due from those who are solvent will be needed for the payment of the creditors of the corporation and the expenses of executing the trust.[3] And the mere fact that the whole amount due from any particular stockholder, for his stock, may not ultimately be needed for that purpose, if all the other solvent stockholders should pay their ratable proportions, according to the amount of their stock, will not authorize the particular stockholder to enjoin the receiver from proceeding to enforce the payment of the balance due from such stockholder, in the first instance.[4]

The deposit notes of a mutual insurance company are its capital, and the receiver appointed on the insolvency of the company is required to collect them, whether so ordered by the court or not.[5] In a suit brought by the receiver of an insolvent bank against a subscriber to its capital stock, for the unpaid balance due on his subscription, interest was allowed from the day fixed in the receiver's advertisement under the statute for the debtors of the association to make payment.[6]

The receiver of a corporation, may under order of court, maintain a suit against a stockholder for any sum due on his stock.[7]

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[1] Sagory v. Dubois, 3 Sandf. Ch. 496. A receiver in such an action, is entitled to recover interest from the date fixed by him for the payment of demands due from the company.

[2] Id.

[3] Pentz v. Hawley, 1 Barb. Ch. 122.

[4] This matter will be more fully considered in the chapter on suits by and against receivers. See, also, Cook on Stock and Stockholders, section 208.

[5] Van Buren v. Chenango County Mutual Ins. Co. 21 Barb. 671.

[6] Sagory v. Dubois, 3 Sandf. Ch. 496, 500.

[7] Elderkin v. Peterson, 8 Wash. 674; Big Creek Stone Co. v. Seward (Ind.), 42 N. E. R. 464; Barcolno v. Tuten, 33 At. R. 2.

Section 458. **Of the Power to Subject the Property of the Shareholders.**— In New York, Massachusetts, Ohio, Iowa, Maryland and Louisiana the receivers of insolvent corporations are authorized to sue for unpaid subscriptions to the capital stock.[1] In New York the receiver may sue the stockholders severally or jointly;[2] but he cannot recover unpaid subscriptions where the corporation itself could not.[3] He may, however, continue such an action when it was instituted by the corporation before his appointment.[4] In an early case it was held that a receiver, in an action for sequestration, and vested only with the ordinary powers of receivers in such cases, could not sue in equity for the unpaid balance of subscription.[5] Under the Rhode Island statute receivers of mutual insurance companies may, for the purpose of paying the debts of the company, levy assessments upon the members.[6] In Louisiana it was thought that the creditor might apply for an order requiring the receiver to make calls upon the stockholders to pay the company's indebtedness.[7]

It is proper for the court, in actions by receivers to collect assessments and unpaid subscriptions, to enjoin the creditors, upon the application of the receiver, from prosecuting like actions.[8] A receiver appointed in one state, with authority to sue in the name of the corporation, may bring an action upon a premium note in another state, if no creditor therein objects or claims the proceeds.[9]

Section 459. **Of the Power to Enforce the Statutory Liability of Shareholders.**— It follows, from what has been already stated, that the receivership is limited to the property and effects of the corporation, and accordingly that it does not include the statutory liability of the stockholders for the payment of corporate debts, after the corporate effects are exhausted, because such liability

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[1] Pentz v. Hawley, 1 Barb. Ch. 122; Farmers & Mechanics' Bank v. Jenks, 7 Metc. 592; Calkins v. Atkinson, 2 Lans. (N. Y.) 12; Rankine v. Elliott, 16 N. Y. 377; Clarke v. Thomas, 34 Ohio St. 46; Stewart v. Lay, 45 Iowa, 604; Stillman v. Dougherty, 44 Md. 380; Frank v. Morrison, 58 Md. 423; Stark v. Burke, 5 La. Ann. 740; New Orleans Gas-Light Co. v. Bennett, 6 La. Ann. 457; Gas-Light & Banking Co. v. Haynes, 7 La. Ann. 114.

[2] Van Wagenen v. Clark, 22 Hun, 497.

[3] Billings v. Robinson, 28 Hun, 122.

[4] Phœnix Warehousing Co. v. Badger, 67 N. Y. 294.

[5] Mann v. Pentz, 3 N. Y. 315.

[6] Tobey v. Russell, 9 R. I. 58.

[7] New Orleans Gas-Light Co. v. Bennett, 6 La. Ann. 457.

[8] Calkins v. Atkinson, 2 Lans. (N. Y.) 12; Rankine v. Elliott, 16 N. Y. 377; Attorney-General v. Guardian Mutual Life Ins. Co. 77 N. Y. 272; Osgood v. Laytin, 48 Barb. 463.

[9] Lycoming Insurance Co. v. Wright, 55 Vt. 526.

clearly cannot be deemed the property of the corporation. We, therefore, consider the true rule to be that the receiver of an insolvent, or dissolved, corporation has no authority to bring an action, on behalf of the creditors of the corporation, to enforce the stockholders' liability to them, unless such authority is expressly conferred upon them by statute.[1]

The Wool-Growers' Manufacturing Co. was a New York corporation organized under an act which provided that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons composing such company shall be individually responsible to the extent of their respective shares of stock of said company." It was held in Story v. Furman,[2] an action brought by the receiver of the said company, that the liability of the members of the company was that of partners, modified to the extent stated in the provision quoted, and that a receiver of the company was entitled to maintain an action to enforce such liability, upon the ground that the act under which the company was organized vested in the receiver, in express terms, the right to enforce the liability.[3] This case was distinguished in Farnsworth v. Wood.[4] There a receiver of a company, organized under another act, brought an action to enforce the liability to creditors imposed by the act upon the stockholders. The court decided that the action was not maintainable and declared that the right of creditors, who were within certain prescribed conditions, to prosecute their claims against certain of the stockholders never was the property of the corporation, nor a right of action vested in it, nor was there any provision of the statute which transferred such rights of action from the creditors to the receiver.

For the same reason it was decided in Jacobson v. Allen[5] that the receiver of a bank could not enforce against the stockholders the liability for double the amount of their stock, which the statute imposed upon them, in favor of creditors. Likewise in Wincock v. Turpin[6] the action of the receiver was dismissed. There the charter of a bank made the stockholders, severally and individually, liable to the amount of their stock to depositors. But in Eames v. Doris,[7] where an additional liability was created in favor of a certain

[1] See Cook on Stock and Stockholders, sections 208, 216.

[2] 25 N. Y. 214.

[3] But see Billings v. Robinson, 94 N. Y. 415; Cuykendall v. Corning, 88 N. Y. 129; McDonald v. Ross-Lewin, 29 Hun, 87.

[4] 91 N. Y. 308.

[5] 20 Blatchf. 525.

[6] 96 Ill 135.

[7] 102 Ill. 350.

class of creditors as a whole, and some of the creditors commenced an action on behalf of all, the receiver was allowed to proceed, by petition concurrent with them, to enforce the liability for the benefit of all the creditors interested. The court in that case enjoined certain individual creditors from prosecuting actions at law to enforce such liability on their own behalf. Where receivers are appointed for an insolvent corporation, under an order of a court of chancery, with authority to collect unpaid installments from stockholders, such receivers possess the powers which are given by the charter of the corporation to the directors in such cases, both as to the time of payment and the amounts to be called in.[1] But an order of court directing the receivers of an insolvent corporation to give sixty days' notice to the stockholders to pay the remaining installments, does not require them to call for the whole amount at one time, upon sixty days' notice, but leaves the receivers the power of fixing the amount of several installments called for, in conformity with the provisions of the charter of the company.[2]

Section 460. **Of the Rights of an Attaching Creditor.** — Where a creditor of a mutual fire insurance company reduced his claim to a judgment, and issued an attachment execution thereon, wherein a mutual member of the company was summoned as garnishee, and said garnishee was indebted to the company on his premium note for his proportion of losses sustained, but the amount of his indebtedness was not, at the time, fixed by assessment, and subsequently the company was dissolved by decree of the court, and a receiver appointed, who proceeded to levy an assessment on all the premium notes to meet outstanding liabilities at the time of the dissolution, it was held that the dissolution and the appointment of the receiver did not abate the attachment proceedings, nor prevent the attaching creditor from prosecuting such proceedings, but that the action of the receiver in levying the assessment simply fixed the measure or amount of the debt which had been levied on by the attachment, and to which the attaching creditor was entitled.[3]

Section 461. **Of Actions Upon Premium Notes.**—The rule in Indiana, as to the pleadings in actions by receivers of insolvent insurance companies to recover assessments upon premium notes, is that all the facts necessary to show a liability upon the note must be pleaded. For, while the court appointing him may prop-

[1] Hall v. United States Ins. Co. 5 Gill, 484.

[2] Ibid.

[3] Hays v. Lycoming Fire Ins. Co. 99 Penn. St. 621.

erly pass upon the question of the necessity of a receiver, it cannot, in that proceeding, settle the question of the liability of the maker of a premium note to pay, either in whole or in part.[1] The liability of the makers of the premium notes being contingent, such contingent or conditional liability is not changed into an absolute one by the insolvency of the company and the appointment of a receiver; since the courts cannot change the terms of the agreement, nor make that an absolute promise which was before a conditional one; and the appointment of a receiver merely clothes him with the power, under the statute, of determining the amount of indebtedness due upon the notes, by proceedings to make the necessary assessments, and by taking such other steps as are required by law to fix the liability of the makers of the notes, the appointment itself in no manner fixing such liability.[2] An apportionment of the losses and an assessment by the receiver, where required by the statute, is an indispensable condition to his right of action upon premium notes; in such an action he must, therefore, allege and prove that he has performed that condition.[3]

Section 462. **The New York Rule in Actions Upon Premium Notes.**—It is also the rule in New York, in this class of cases, that the receiver takes the place of the directors in ascertaining the amount of demands against the company, and in determining the necessity for an assessment, as well as its amount, except that he cannot act without the sanction of the court. The court, however, does not make the assessment, the receiver being himself the actor for that purpose, and his authority depending, not upon the order of the court, but upon the existence of the facts rendering an assessment proper. The requirement of the approval of the court is an additional restriction upon the receiver's authority, but does not dispense with the other conditions. The court, therefore, neither adjudicates upon the liability of the company, nor the amount for which assessments shall be made, nor the ratio of assessment, but merely sanctions the acts of the receiver.[4]

In thus making assessments upon the makers of premium notes

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[1] Manlove v. Burger, 38 Ind. 211. See also Embree v. Shideler, 36 Ind. 423; Tippecanoe Township v. Manlove, 39 Ind. 249; Manlove v. Naw, 39 Ind. 289.

[2] Williams v. Babcock, 25 Barb. 109.

[3] Shaughnessy v. The Rensselaer Ins. Co. 21 Barb. 605; Devendorf v. Beardsley, 23 Barb. 656; Thomas v. Whallon, 31 Barb. 172; Bangs v. McIntosh, 23 Barb. 591; Sands v. Sanders, 28 N. Y. 416; Jackson v. Roberts, 31 N. Y. 304.

[4] Thomas v. Whallon, 31 Barb. 172. See also McDonald v. Ross-Lewin, 29 Hun, 87.

under the laws of New York, the receiver acts under the statute, in a ministerial and not in a judicial capacity.[1] And his action being ministerial, the fact that a former receiver has made an assessment upon the same notes, will not prevent his successor from making a new assessment for the same purposes, since it is merely repeating the performance of a condition precedent to a right of action upon the notes by the receiver, and is by no means a judicial determination of the matter.[2] Neither is the receiver required to prove all the facts upon which he, or the company, allowed the losses for which the assessment was made. All he need show is that sufficient claims for losses were presented to the company, or to him, and which he allowed, to make up the sum for which the assessment was levied.[3]

The order of the court approving the assessment does not operate conclusively as against the maker in an action against him. The approval of the court and the act of the receiver are the equivalent of the act of the directors, had the assessment been made by them. It is a ministerial and not a judicial act.[4] In making such an assessment the receiver may include in the amount to be raised, a balance of a former assessment which could not be collected.[5] When he is satisfied, from an examination of the liabilities of the company, that there is no note which is not chargeable to its full amount for liabilities justly attaching, he may make a general assessment upon all the notes to their full amount, without regard to classes, and without specifying the name of the party bound to contribute, or the amount of the note.[6] Moreover the liability of the members of mutual insurance companies upon their premium notes, is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the directors of the company, and vested with their rights and powers and nothing more.[7]

Section 463. **Defenses in Actions Against Stockholders.**—In a suit by the receivers of a corporation, after it became insolvent, upon a note given to the corporation, the claim that the company

[1] Thomas v. Whallon, 31 Barb. 172; Sands v. Sweet 44 Barb. 108. *Cf.* Bangs v. Duckinfield, 18 N. Y. 592.

[2] Sands v. Sweet, 44 Barb. 108; Jackson v. Van Slyke, 44 Barb. 116, note *a*.

[3] Sands v. Hill, 42 Barb. 651; Jackson v. Roberts, 31 N. Y. 404.

[4] Bangs v. Duckinfield, 18 N. Y. 592.

[5] Bangs v. Gray, 12 N. Y. 477.

[6] Sands v. Sanders, 28 N. Y. 416.

[7] Shaughnessy v. The Rensselaer Ins. Co. 21 Barb. 605; Williams v. Babcock, 25 Barb. 109; Savage v. Medbury, 19 N. Y. 32. *Cf.* Devendorf v. Beardsley, 28 Barb. 656.

was never properly organized, should, it seems, be pleaded in abatement.[1] If a note in the hands of the corporation was void, or incapable of enforcement, by reason of fraud, or illegality, in its procurement or inception, passing it into the hands of a receiver does not purge it of these defects.[2] He must properly allege and prove that the chose in action upon which he sues was part of the assets of the corporation. Accordingly, where the corporation in the hands of a receiver had changed its name, and among its assets was a note made payable to it in its former name, it was held, in an action by the receiver thereon, that he must show that the note was part of the company's assets.[3] He cannot recover upon a premium note where the liability depends upon an assessment and notice thereof, and the company never gave the notice. To maintain successfully such an action he must take the steps necessary to fix the liability of the defendant.[4] And where he has himself made the assessment, he must, according to the practice in Indiana, allege and prove that the court has passed upon the validity of the demands for the payment of which the assessment is made.[5]

A stockholder, sued for unpaid subscriptions to stock, or upon assessments, cannot plead, as a defence, any irregularity in the appointment of the receiver, or that the appointment was procured through fraud, or that the assessment was erroneously ordered; nor can he set up any fraudulent acts of the officers of the company, or of the receiver, or misdirection by the court. Neither can he plead that the corporation is not indebted, nor any other matters that should have been presented in the proceeding in which the receiver was appointed or the assessment ordered.[6]

It is no answer to an action upon a note given in payment for subscription to stock, that it was without consideration and in aid of a fraudulent transaction to which the defendant was a party.[7] The maker of a premium note is not relieved from liability thereon because the receiver allowed a claim to which he might have pleaded the statute of limitations.[8]

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[1] Brouwer v. Appleby, 1 Sandf. Super. Ct. 158. It is for the state only to question the proper organization of a corporation.

[2] Devendorf v. Beardsley, 28 Barb. 656.

[3] Hyatt v. McMahon, 25 Barb. 457.

[4] Williams v. Babcock, 25 Barb. 109; Thomas v. Whallon, 31 Barb. 172.

[5] Downs v. Hammond, 47 Ind. 131.

[6] Stewart v. Lay, 45 Iowa, 604; Schoonover v. Hinckley, 48 Iowa, 82.

[7] Farmers & Mechanics' Bank v. Jenks, 7 Metc. 592.

[8] Sands v. Hill, 42 Barb. 651.

Section 464. **Further of Defences in Actions Against Stockholders — Estoppel.**— It cannot be shown that the stock was only partly taken if the defendant, being aware of that fact, took part in the affairs of the company.[1] And a defendant who acted as a director of the corporation is estopped from denying its corporate existence and from proving that the capital was not paid in full, in cash, where the statute required it to be fully paid before business commenced, and that he had been induced to become a subscriber through the false statement that the stock had been paid in full.[2]

But, in a case in Illinois, it was held a valid defence that the stockholder was not a party to the proceeding in which the receiver was appointed, and was not, for that reason, concluded by the decree; also that the decree was invalid, inasmuch as it authorized the receiver to compromise with stockholders as to the payment of their subscriptions.[3] And it is a perfect defence to an action brought to recover an assessment upon a premium note that the power to make such assessment was limited by statute to the necessity of providing for the payment of "just claims," and that neither the receiver nor the court has passed upon the justice of the claims for which the assessment was levied.[4]

No recovery can be had for an unpaid balance of subscription to stock, against a party who in good faith, before the appointment of the receiver, transferred all his stock, and before such transfer paid all the assessments thereon, it not appearing that any of the present creditors of the company were creditors when the transfer was made.[5] The collection of a judgment in such an action can not be enjoined until the debts of the corporation are ascertained and the amount due from each stockholder is determined. Equities of that kind should be pleaded in the original action.[6]

In New York stockholders have no right to come in as co-plaintiffs with the receiver, in an action brought by him against the directors for their official misconduct, the cause of action being one which was vested in the corporation and not in the stockholders.[7]

Section 465. **In General of the Receiver's Title.**—It will be found that whether the title vests in the receiver before or after the final decree depends upon the statute under which he is appointed. In New York, a temporary receiver who is appointed before final

[1] Stillman v. Dougherty, 44 Md. 380.
[2] Ruggles v. Brock, 6 Hun, 164.
[3] Chandler v. Brown, 77 Ill. 333.
[4] Embree v. Shideler, 36 Ind. 423; Downs v. Hammond, 47 Ind. 131.
[5] Billings v. Robinson, 28 Hun, 122.
[6] Pentz v. Hawley, 1 Barb. Ch. 122.
[7] Kimball v. Ives, 30 Hun, 568.

judgment, in an action for a compulsory dissolution is expressly permitted to sell or otherwise dispose of the property as directed by the court.[1]

In New Jersey the order of appointment operates as a conveyance of the property of the corporation to the receiver.[2] In Michigan, it has been held that the title to the real estate of a corporation is not divested by the appointment of a receiver *pendente lite*, and when no assignment of such title is ever made by the corporation to the receiver, who afterwards becomes *functus officio*, the real estate of the corporation is subject to the lien of a judgment and execution, as if there had never been a receiver.[3] And, in Indiana, the appointment does not divest a judgment lien previously acquired; where the judgment can be collected in the usual way, the court may properly refuse to enforce it out of moneys in the hands of the receiver, when it is not shown that such moneys are the proceeds of a sale of the property upon which the creditor has a lien.[4] The receiver becomes entitled to all rents accruing after his appointment.[5]

The receiver acquires no title to property in the possession of, but not owned by a corporation, of which he is the receiver, *e. g.*, a special deposit of money in a bank,[6] or securities pledged collaterally with a draft forwarded for collection.[7] But where a plaintiff had, for several years, kept an account with a particular bank, and on the 5th of May, 1884, had deposited with it a sight draft upon a corporation for an indebtedness, and the bank, being insolvent at the time, had forwarded the draft to its agent, to whom the amount was paid; and on the 7th of May, after the bank had failed, the collection not having been entered upon the plaintiff's pass book, although it was credited on the books of the bank as a cash item, and the receiver had notice of these facts before the money was received by him, it was held, there being no fraud alleged in the complaint, that the proceeds belonged to the bank and not to the plaintiff.[8]

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[1] N. Y. Code of Civ. Proc., section 1788.

[2] Corrigan v. Trenton, Delaware Falls Co. 7 N. J. Eq. 489, which overruled an earlier case; Willink v. Morris Canal & Banking Co. 4 N. J. Eq. 377.

[3] Montgomery v. Merrill, 18 Mich. 338.

[4] Southern Bank of Kentucky v. Ohio Ins Co. 22 Ind. 181.

[5] Corrigan v. Trenton, Delaware Falls Co. 7 N. J. Eq. 489. See also Fish v. Potts, 8 N. J. Eq. 27.

[6] Kinsela v. Cataract City Bank, 4 N. J. Eq. 158.

[7] Corn Exchange Bank v. Blye, 101 N. Y. 303.

[8] St. Louis & San Francisco Ry. Co. v. Johnston, 23 Blatchf. 487.

It is clear that the receiver of a corporation takes the assets subject to all the conditions and legal disabilities with which they were affected in the hands of the corporation itself.[1] He can acquire no better title nor any greater interest than the corporation itself had, and his acquisition of the property is similar to that of a purchaser, or assignee, of a chose in action. He takes subject to all equities, set-offs and other defences which might be claimed against the company itself.[2]

A creditor of a bank may have the benefit of any set-off which would be just and equitable between the parties, and if he have security for a specific claim to an amount greater than that debt, he may set-off the excess against other debts due by the bank to him, but he must first apply such security to the satisfaction of his claim. He cannot prove his whole debt against the general fund, and apply his security to the balance remaining unpaid after receiving all dividends.[3]

Under statute the receiver on final decree, becomes vested with the title to the corporate assets.[4]

Section 466. **Of the Right of Set-off.**— It has been held in New Jersey that the debtor of an insolvent bank, whether his indebtedness has actually accrued or not at the time of the insolvency, may set-off against his indebtedness to the receivers, either a deposit in the bank, or bills of the bank *bona fide* received by him before the failure of the corporation. But the claim of a debtor against an insolvent corporation does not constitute a legal set-off as against the receivers. In an action at law by the receivers the defendant will, however, be permitted, under the provisions of the statute to prevent frauds by incorporated companies, to avail himself of the defence.[5]

And in New York it was, under the former chancery practice, the rule, that a receiver appointed under the act of the 18th of January, 1836, or appointed by the court of chancery under the provisions of the revised statutes relative to proceedings against corporations in equity, was bound to off-set a liquidated debt due to the corporation against an unliquidated debt due from the corporation to the

[1] Devendorf v. Beardsley, 23 Barb. 656, 659.

[2] Morse v. Chapman, 24 Ga. 249; *In re* Van Allen, 37 Barb. 225.

[3] State Bank v. Receivers of Bank of New Brunswick, 3 N. J. Eq. 266.

[4] Casey v. La Societé de Credit Mobilier de Paris, 2 Woods, 77; Repubic Life Insurance Co. v. Swiegert, 135 Ill. 150; Clinkscales v. Pendleton Manufacturing Co. 9 S. C. 318; Receiver v. Spielman, 24 At. R. 571.

[5] Receivers v. Paterson Gaslight Co. 23 N. J. Law, 282.

same person, in the same manner as trustees of insolvent debtors are bound to off-set cross-demands arising from mutual credits as well as from mutual debts. In such cases the right of set-off was confined to liquidated debts or to such as might have been off-set in a suit at law between the original parties; but it also extends to all mutual credits, arising *ex contractu* between such original parties.[1]

But, in an action by the receiver against a shareholder, to recover illegal dividends declared in violation of a statute prohibiting any dividends which might impair the capital stock, the shareholder will not be allowed to set-off an indebtedness due to himself from the corporation, since, for the purposes of such action, the receivers do not represent the corporation, but its creditors, for whose benefit the suit is brought. The dividends thus illegally paid being a fraud upon the creditors, and the reparation sought being the restoration of the funds for their benefit, claims growing out of independent matters between the defendant and the corporation itself are not a proper subject of set-off.[2]

An attachment lien acquired by a creditor upon the property of a corporation is not avoided by the appointment of a receiver;[3] but no levy can be made under an attachment subsequently granted.[4] The property, however, is subject to the lien of a judgment when the receiver is appointed only *pendente lite*, for the purpose of taking charge of the affairs of the company, and not for the purpose of making a distribution.[5] Such lien attaches only to the interest which the company had in the real estate when passed over to the receiver, and not to any increased interest therein acquired previously, by reason of payments of purchase money made by him.[6]

Section 467. **Of Subsequent Acts of the Corporation as Affecting the Title.**—Where a receiver of a corporation has been appointed in New York, under the provisions of the revised statutes relative to proceedings against corporations in equity, and its property and effects have thus become vested in him for the benefit of the creditors and stockholders of the institution, the answer of the

[1] Holbrook v. The Receivers of the American Fire Ins. Co. 6 Paige, 220.

[2] Osgood v. Ogden, 4 Keyes, 70. See also, Gillett v. Phillips, 13 N. Y. 114.

[3] Hubbard v. Hamilton Bank, 7 Metc. 340.

[4] Hagedon v. Bank of Wisconsin, 1 Pin. (Wis.) 61; Atchison v. Davidson, 2 Pin. (Wis.) 48.

[5] Ellicott v. United States Ins. Co. 7 Gill. 307. *Cf.* Attorney-General v. Continental Life Ins. Co. 28 Hun, 360.

[6] Ellicott v. United States Ins. Co. 7 Gill. 307. See section 224, upon set-off.

corporation cannot affect the property in the hands of its receiver, nor have any effect whatever in determining the right to the same.[1]

Section 468. **Of Estoppel by Judgment Against the Corporation.**— A judgment against the corporation operates as an estoppel against the receiver. He may, however, avoid the estoppel by showing that the judgment was rendered without jurisdiction, or was procured through fraud or collusion. It seems that he may also move to have the judgment reopened, and that he may be allowed to come in and defend.[2] The rule prevents him from interposing any defence or raising any question which might have been made in the original action. Even if the judgment was obtained after his appointment, if it nowhere appears that the company was dissolved before the judgment was rendered, he is still estopped by it.[3] In an action upon such a judgment recovered in another state, upon a policy of insurance issued by the company, the receiver of the company could not set up the defence that the policy was void by reason of the breach of one of its conditions.[4] Under the same rule he cannot enjoin the collection of a tax against the company which was previously declared valid in an action brought in the company's behalf.[5]

Section 469. **Of the Title to Real Property.**— At common law every grant of real property to a corporation carried with it, by implication, the condition that, if unsold at the time of the dissolution of the corporation, it should revert to the grantor or his heirs. The history of this doctrine must be traced back to a period prior to the time when mercantile and moneyed corporations were extensively created, and before their rights and properties had assumed anything like their present importance and extent. It may well be doubted whether this doctrine was ever applied, even in England, to the latter class of corporations. In this country the reversion has generally been guarded against by special provisions of statute law.[6] In Owen v. Smith[7] the doctrine is said to be obsolete. And in that case it was expressly declared that the title to the real property of a corporation does not revert to the original grantors

[1] Davenport v. City Bank of Buffalo, 9 Paige, 12.

[2] Pringle v. Woolworth, 90 N. Y. 503.

[3] Pringle v. Woolworth, 90 N. Y. 503.

[4] Id.

[5] Hopkins v. Taylor, 87 Ill. 436.

[6] Angell & Ames on Corporations, sections 779, 779*a*. *Cf.* Heyward v. The Mayor, 7 N. Y. 314.

[7] 31 Barb. 641.

or their heirs, but vests in the receiver of the corporation, and is to be administered by him for the benefit of the creditors and stockholders.

Section 470. **Of the Liabilities Incident to the Receivership.**— A purchaser of the assets of a corporation at a receiver's sale acquires thereby no right of action against the former officers of the corporation, to compel them to account for assets or effects of the corporation.[1] As a general rule a corporation cannot be subjected to obligations, or liabilities, incurred by a receiver, or his agents or servants, while in charge of the corporate property, only the receiver in his official capacity and the property in his charge being liable.[2] Neither is the receiver authorized to reinsure for risks already assumed by the company and to pay the new premium out of its assets.[3]

Section 471. **Of the Aid of the Court in the Administration of the Receivership.**— A tribunal which has jurisdiction to appoint a receiver of an insolvent corporation, may, in aid of that appointment, forbid any subsequent interference with the property in his possession by way of levy or seizure upon attachment or execution. The power to make such an order is a necessary incident to its jurisdiction. This rule was declared in a recent New York case, upon an appeal from an order restraining all persons "from bringing or prosecuting suits or proceedings against the corporation concerned, or in any way interfering with its assets."[4]

A party who has deprived the receiver of a valuable privilege which was incidental to assets coming into his hands, will be compelled by the court to restore such privilege. Accordingly, where certificates of stock were duly issued to a receiver of a corporation, and it was the duty of the agent of the company issuing the stock to register the same, and to certify that the certificates represented shares which had been duly registered, the court compelled a party who had prevented the stock belonging to the receiver from being registered, and had procured the registry in his own favor, to restore such privilege to the receiver.[5]

So also, where certain shares of stock in an incorporated company are in the hands of its receiver, the certificates having been duly is-

[1] Mann v. Fairchild, 2 Keyes, 106.

[2] Heath v. Missouri, Kansas & Texas Ry. Co. 83 Mo. 617.

[3] In the Matter of the Croton Insurance Co. 3 Barb. Ch. 642.

[4] Woerishoffer v. North River Construction Co. 99 N. Y. 398.

[5] Erie Ry. Co. v. Heath, 8 Blatchf. 536.

sued to him, which certificates are entitled to be registered by the transfer agent of the company, and to be certified as representing shares duly registered, such registration being a valuable privilege appurtenant to the shares, one who prevents them from being so registered, and who converts the privilege to his own use, by procuring it to be conferred upon an equal number of shares of his own stock, may be compelled by the court to make good the stock in the hands of the receiver by restoring such privilege.[1]

A receiver of an insolvent insurance company having ascertained that it would not be necessary to collect the whole amount due on the deposit notes, the court, by an order, excused him from collecting all over the amount necessary to pay the claims against the company, and subsequently made another order authorizing him to surrender the notes to the makers.[2]

Section 472. **Of Instruction and Direction by the Court.**— The fact that the receiver is an officer of the court entitles him to apply to it for instructions.[3] And in all cases where he is in doubt as to the extent of his authority, or the proper performance of his duty, he should, for his own protection and that of his sureties, apply to the court for instruction. This principle should be followed even in cases where the order of his appointment clothes him "with all the usual powers of receivers in like cases." Thus where he is in doubt as to the propriety of allowing a set-off he should apply to the court for instructions.[4]

Under the New York code of civil procedure a receiver of a corporation has been ordered to submit his books for the inspection of an adverse party.[5] All questions arising in the course of the corporate business, while it is being conducted by a receiver, must be left to the discretion of the court which created the receivership. Seldom, in cases other than those of palpable error and injustice, will the appellate court interfere with the exercise of such discretion.[6]

Section 473. **Of Distribution.**—The general rule is that a receiver should pay nothing without an order.[7] He cannot make a dividend in ordinary cases without the special sanction of the

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[1] Erie Ry. Co. v. Heath, 8 Blatchf. 536.

[2] Van Buren v. Chenango Mutual Ins. Co. 12 Barb. 671.

[3] *In re* Van Allen, 37 Barb. 225.

[4] *In re* Van Allen, 37 Barb. 225.

[5] Greason v. The Goodwillie-Wyman Co. 38 Hun, 138, construing Laws of N. Y. 1883, chapter 378, section 8, amended by Laws of 1885, chapter 40.

[6] Monitor Furnace Co. v. Peters, 40 Ohio St. 575.

[7] Fletcher v. Dodd, 1 Ves. Jr. 85.

court.[1] Where, under the New Jersey act to prevent frauds by incorporated companies, of February 16, 1829, an injunction was granted, and receivers were appointed to take possession of the property of a corporation, which property was subject to various incumbrances, and a decree of sale was made, it was held, that the proceeds must be distributed according to the priority in date of the incumbrances; that the assignment, by the company, of the rents to accrue on certain leases, as security for the payment of certain notes, did not constitute a lien on the fund in court, for the amount of the notes, in preference to subsequent mortgage and judgment creditors; that, where there was a bank judgment, which was a lien on the whole fund in court, including the rents, and next to it, in priority of date, was a mortgage, whose lien was only on the proceeds of the sale, and not on the rents, and next to the mortgage, in priority of date, was a judgment, whose lien was on the whole fund in court, including the rents, and the fund in court, exclusive of the rents, was sufficient to pay the bank judgment and part of the mortgage, it was not the duty of the court to apply the rents to the payment of so much of the bank judgment, in aid of the mortgage, and in prejudice of the subsequent judgment creditor; and that although there was a mortgage on a part of the land sold by the receiver, which was on the land when the company bought it, the purchaser at the receiver's sale should take the land free from all incumbrances whatever.[2]

It is for the judge alone to determine, upon an application for a sale by the receivers, of demands due to the bank, that it ought to be postponed. And the receiver who has assets on hand, consisting of choses in action not in litigation, cannot make a dividend and sue the stockholders for the deficiency until he has first applied to the court, and taken its direction as to a sale.[3] The Georgia statute providing that where a receiver is appointed for an insolvent bank, bill-holders shall be paid in preference to other creditors, does not apply where the bank makes a voluntary assignment for the payment of all the debts of the bank.[4]

Section 474. **Of the Application of the Fund—Payment of Liabilities.**—If any balance remain in the hands of the receiver of an insolvent corporation, after satisfying the debts of the corporation,

[1] Fletcher v. Dodd, 1 Ves. Jr. 85. See upon this subject section 283.

[2] Corrigan v. Trenton Delaware Falls Co. 7 N. J. Eq. 489.

[3] *In re* Hollister Bank, 28 N. Y. 508.

[4] Dobbins v. Walton, 27 Ga. 614.

and the necessary expenses of executing the trust, it must be distributed among the several stockholders who have paid in full for their stock.[1] But bill-holders are not entitled to a priority over other creditors in the distribution of the assets of an insolvent bank, receivers of whose property have been appointed under the Massachusetts statute of 1851, ch. 127.[2]

It is for the court to direct the receiver in respect to the payment of creditors and their respective priorities, even in the case where one creditor has obtained, upon a debt due to him, a judgment against the corporation.[3] When an action has been instituted by a corporation against one of its shareholders, to recover the amount of his unpaid subscription, it constitutes no defence to such an action that a receiver is afterward appointed over the corporation, and the action will not be defeated because of such appointment, especially when the receiver has taken no steps to possess himself of the cause of action, or to collect the amount due from defendant.[4]

Where a receiver is appointed over an insolvent insurance company, with authority to collect debts and to pay liabilities, upon a bill by judgment creditors of the corporation against the receiver, to compel him to bring suits for the recovery of its assets, it is not proper for the court to decree that the receiver should apply the money in payment of the judgments; but he should be directed to bring it into court, in order that the court itself may distribute it to the parties entitled.[5]

A judgment against a corporation, recovered in a state court, in the name of its receiver—the suit having been brought by leave of the federal court by which the receiver was appointed—for materials purchased before the appointment, is valid; but the order in which the judgment shall be paid is determinable by the federal court.[6] Where, under the laws of the state, a receiver for winding up the affairs of an insolvent corporation, upon the final order for his appointment, becomes entitled to all the property and effects of the corporation, for the purpose of distributing them among its creditors and shareholders, such final order is in the nature of a decree in an ordinary creditor's suit, against executors or others who are trustees of a fund upon which several creditors have claims for

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[1] Pentz v. Hawley, 1 Barb. Chan. 122.

[2] Stockholders of Cochituate Bank v. Colt, 1 Gray, 382.

[3] Pringle v. Woolworth, 90 N. Y. 511.

[4] Glenville Woolen Co. v. Ripley, 48 N. Y. 206.

[5] Benneson v. Bill, 62 Ill. 408.

[6] Harding v. Nettleton, 86 Mo. 658. s. c. 4 West. Rep. 336.

the payment of their debts ratably, or according to a specified order of priorities. And in such case any creditors, who are not nominal parties to the suit, may make themselves such parties in fact by coming in and presenting their claims under the decree, and submitting themselves to the jurisdiction of the court for the adjustment of their demands; and a creditor thus coming in, as a *quasi* party to the action, is entitled to the full benefit of the decree.[1]

A judgment in faver of a state, against receivers for taxes upon the corporate property, should be so entered as to be enforceable against the trust property only.[2] For services of counsel rendered to the corporation after the appointment of a receiver, an action against the receiver cannot be maintained. The officers of the company cannot, after that date, subject the funds to any legal liability, but the receiver must pay for services rendered prior to his appointment.[3]

The expenses of the trustee and receiver, reasonably incurred in the discharge of his trust, are a lien upon the trust property prior to that of the bondholders, and among the expenses which should be allowed him are reasonable fees for counsel employed by him in the proper discharge of his trust, the cost of litigation, and the expenses in taking care of, protecting and repairing the property in his charge.[4]

A successful defendant in an action brought by a receiver is entitled to an immediate order for payment of the costs out of any funds in the receiver's hands.[5]

Section 475. **Compensation of Receiver.** — In New York a receiver, or other trustee, is not authorized to act as counsel in the business of his trust, so as to entitle himself to extra counsel fees for professional services beyond the allowances provided in the fee-bill to attorneys and solicitors. The commissions allowed by statute are intended to be a full compensation for his personal services in the execution of his trust.[6] Where the account of a receiver, or other trustee, is made up without a direction from the court to make periodical rests therein, his commissions for receiving and paying

[1] *In re* City Bank of Buffalo, 10 Paige, 378. And, as to the time when a plaintiff, in an action pending against an insolvent corporation, may prove his claim and share in a dividend declared by the receiver, see Smith v. Manhattan Insurance Co. 4 Hun, 127.

[2] Commonwealth v. Runk, 26 Penn. St. 235.

[3] Barnes v. Newcomb, 89 N. Y. 113.

[4] McLane v. Placerville, etc. R. R. Co. 66 Cal. 606.

[5] Columbian Insurance Company v. Stevens. 37 N. Y. 536.

[6] In the matter of the Bank of Niagara, 6 Paige, 213.

must be computed upon the aggregate amounts of his receipts and expenditures for the whole time of accounting.[1] If the receiver, or other trustee, renders annual accounts in conformity with the provisions of the rules of the court, he may charge his commissions on the receipts and disbursements of the previous year, exclusive of such sums as have been received for principal, and re-invested. But if he neglect to render his accounts annually, upon the making up of his accounts afterward, he can only charge his commissions upon the gross amount of the receipts and disbursements for the whole period since the rendering of his last regular account.[2] Where a receiver of an insolvent mutual insurance company, having ascertained that it would not be necessary to collect the whole amount due on the deposit notes, obtained an order excusing him from collecting all over the amount necessary to pay the claims against the company, and afterward obtained another authorizing him to surrender the notes to the makers, it was held that he was entitled to his commissions on the value of the notes surrendered.[3]

Section 476. **Power of Court to Authorize Receiver of Private Corporation to Issue Certificates — Prior and Preferential Debts — Receivership Expenses.** — In the preceding chapter, which concerns receivers' certificates, the application of that doctrine to strictly private corporations is considered; and the power of courts of equity to authorize receivers of such corporations to issue certificates of indebtedness and make them a paramount lien on the property is there discussed.[4]

In the chapter upon receivers of railways the subject of prior and perferential debts is considered. As a strictly private corporation, unlike a railway company, owes no special duty to the public, the doctrine of preferential debts, which is the payment in preference to the complainant's lien of certain debts and obligations of the company incurred prior to the appointment of a receiver, is not applicable to it.[5]

But when the property of strictly private corporations, as well as of *quasi* public corporations and individuals, has been placed in the hands of a receiver, all expenses for safe-keeping and preservation, as well as all expenses incurred in carrying on the business, "are

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[1] In the matter of the Bank of Niagara, 6 Paige 213.

[2] In the matter of the Bank of Niagara, 6 Paige, 213.

[3] Van Buren v. Chenango Mutual Insurance Co. 12 Barb. 671.

See chapter 24 upon compensation of receivers.

[4] Section 419.

[5] Merchants' Company of Atlanta v. Moore (Ala.), 17 So. R. 705; Phillips v. Wise (Tex. Civ. App.), 31 S. W. R. 428.

properly payable out of the income, if there be any; and if there be none, then out of the proceeds of the *corpus* of the estate when sold."[1]

Section 477. **Continuing the Business of the Corporation.** — The appointment of a receiver of the property of a corporation or individual is not for the purpose of continuing the business of the debtor, but rather to preserve and protect the property during the litigation. From this statement are to be excepted railroads and *quasi* public corporations, in the operation of which the public has a special interest, and which owe a duty to the public.

The current of the authorities is strongly against courts carrying on the business of a strictly private corporation and individuals, and this should be done only when the nature and condition of the business are such that to continue it would be to the advantage and benefit of all concerned, and constitute the exercise of a wise judicial discretion. That a court of equity has power to continue the business of the debtor defendant, whether corporation or individual, is to be conceded.[2] It is a matter within judicial discretion, the exercise of which will not be disturbed except in a case of flagrant error and injustice.[3]

The courts of England are so averse to engaging in and continuing the business of the defendant that where all the bondholders petitioned for such to be done, the court hesitated, and announced that the application would be granted only on precedent.[4]

As to whether a mine shall be operated by the receiver, has been said to be a matter of business economy.[5] In another state it was held that the court would not appoint a receiver to carry on the business of mining.[6]

But the business, if continued by the receiver, should be wound up with the utmost speed.[7] It is only in extreme cases and where *quasi* public corporations are involved that a chancery court is justified in undertaking to carry on indefinitely the business through a receiver. Outside of railroad corporations the purpose of the court should be the preservation of the property.[8]

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[1] Hooper v. Central Trust Co. (Md.) 32 At. R. 505.

[2] Section 293. Blythe v. Gibbons, 35 N. E. R. 557.

[3] Wilmington Star Mining Co. v. Allen, 95 Ill. 288.

[4] Makins v. Ibotson, 1 Ch. (1891) 188.

[5] Wilmington Star Mining Co. v. Allen, 95 Ill. 88.

[6] Hand v. Dexter, 41 Ga. 454.

[7] Etowah Mining Co. v. Wills Valley Mining & Manufacturing Co. (Ala.) 17 So. R. 522.

[8] Little Warrior Coal Co. v. Hooper, (Ala.) 17 So. R. 118.

The United States circuit court of appeals has declared that it is not the function of a court of equity to carry on the business of a private corporation, and mentions the haste of receivers to assure the court that if they had some capital they would successfully continue the business which wrecked the company.[1]

Ordinarily the business of the company should not be continued by the receiver;[2] and an injunction granted before the appointment of a receiver, enjoining the company from continuing its business, is operative against the receiver.[3]

III.

Of Receivers of National Banks.

Section 478. **Of the Appointment.** — The comptroller of the currency is authorized, by a provision of the national banking act, to appoint receivers of the property and franchises of a national bank, when the bank refuses to pay its circulating notes, and is in default.[4] In general, receivers of these banks are not appointed except by the comptroller, but it is held that his power of appointment is not exclusive, that it does not oust the courts of equity of their authority in the matter, and that there is, therefore, in the nature of the case, nothing to prevent any court of competent jurisdiction from appointing a receiver of a national bank, in any case where, according to the rules of equity, it may pursue such a course with regard to

[1] Hanna v. State Trust Co. 70 Fed. R. 2.

[2] Vance v. Shiawassee Circuit Judge (Mich.) 60 N. W. R. 761. See further upon this subject section 293.

[3] Steel v. Gordon (Wash.) 45 Pac. R. 151.

[4] Act of June 3, 1864, section 50; U. S. Rev. Stat. section 5234; 13 Stat. at Large, 99. The original enactment is viz.: "That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to such association, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of all his acts and proceedings." This provision is, in substance, re-enacted in section 5234 of the Revised Statutes, *q. v.*

any other insolvent corporation.[1] Accordingly, where a bank has gone into voluntary liquidation and the comptroller has, in consequence, no power under the statute to appoint a receiver, a proper court, in a case where such an action is necessary to protect the interests of a creditor, may lawfully appoint a receiver for it.[2]

The appointment will be presumed to have been with the concurrence or approval of the secretary of the treasury.[3]

Section 479. **What the Receiver Represents — Effect of the Appointment.** — The appointment of a receiver of a national bank by the comptroller, with the concurrence of the secretary, constitutes him an officer of the United States.[4] He is the instrument of the comptroller and may be removed by him,[5] but, while he represents the bank, its stockholders and the creditors, he does not in any sense represent the government.[6] The appointment supersedes the authority of the officers of the bank. They are, *ipso facto*, deprived of the power to carry on the business of banking, but the corporate franchise still exists. The corporation is not dissolved, and the bank continues to exist.[7] Suits may, therefore, properly be brought against it in its corporate capacity, which should be defended in the same capacity,[8] but the receiver is usually a proper party defendant in proceedings for the adjudication of claims against the bank.[9]

The legality of the appointment cannot be questioned collaterally, as, for example, by the debtors of the bank in a suit by the receiver to enforce the claims of the bank. In such a case the bank might move to have the appointment set aside, but the debtors cannot.[10]

The assets of a national bank in the hands of a receiver constitute a trust fund, in behalf of all creditors having claims thereon valid

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[1] Irons v. Manufacturers' National Bank, 6 Biss 301; Wright v. Merchants' National Bank, 1 Flippin, 561.

[2] Irons v. Manufacturers' National Bank, *supra*.

[3] Price v. Abbott, 17 Fed. R. 506,

[4] Stanton v. Wilkenson, 8 Benedict, 357; Gibson v. Peters, 150 U. S. 342; Thompson v. Schaetzel, 2 S. D. 395.

[5] Kennedy v. Gibson, 8 Wall. 505.

[6] Case v. Terrell, 11 Wall. 199; Price v. Abbott, 17 Fed. R. 506.

[7] Bank of Bethel v. Pahquioque Bank, 14 Wall. 383; Security Bank v. National Bank of the Commonwealth, 2 Hun, 287; Green v. Walkill National Bank, 7 Hun, 63; Chemical National Bank v. Hartford Deposit Co. (Ill.) 41 N. E. R. 225.

[8] See the cases in the preceding note and compare, as to the effect of the appointment upon the right of action of shareholders to recover from the directors and officers for the fraudulent and negligent management of the affairs of the bank. Brinckerhoff v. Bostwick, 88 N. Y. 52.

[9] Turner v. First National Bank, 26 Iowa, 562.

[10] Cadle v. Baker, 20 Wall. 650. *Cf.* Platt v. Beebe, 57 N. Y. 339.

and in full life when the receiver was appointed, which the statute of limitations does not touch or affect.[1]

It has been held that the receiver is entitled to be substituted as sole defendant in an action pending against the bank at time of appointment; and that after the appointment the bank's right of appeal ceases.[2]

Section 480. **Of the Administration of the Receivership — Rights, Powers and Duties of the Receiver.**— The clause of the act of 1864, which prescribes that the receiver shall be "under the direction of the comptroller," means nothing more than that he shall be subject to the comptroller's direction, not that he shall not act without orders. Accordingly, it is his duty to bring suits to collect the assets, without having been instructed to do so by the comptroller.[3] He is, however, limited as to his functions by the object of the receivership and the duties which it involves.[4] In one point of view he is the mere agent of the comptroller of the currency, for the purpose of bringing the residue of the assets into the United States treasury. And while, for the full accomplishment of the object of the statute, and the due performance of his duties, all necessary authority is conferred upon him, yet this authority does not extend to the control of bonds deposited by the bank with the treasurer of the United States to secure the currency of the bank.

The receiver, therefore, has no concern with and is not a proper party defendant to a suit brought to establish title to such bonds by one claiming them by assignment from the bank.[5] He has, however, an undoubted right, as has already been stated, to bring suits to enforce demands due the bank,[6] the authority to institute such suits being deemed incidental to the proper discharge of his functions. The receiver's decision, it may, however, be observed, in rejecting a claim alleged to be due by the bank is not final, but the claimant may still sue to recover it.[7]

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[1] Riddle v. First National Bank, 27 Fed. Rep. 503, 506 (1886).

[2] Sioux Falls National Bank v. First National Bank, 6 Dak. 113.

[3] Bank v. Kennedy, 17 Wall. 19. In this case Bradley, J., said: "His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do." Price v. Abbott, 17 Fed. R. 506.

[4] Van Antwerp v. Hulburd, 8 Blatchf. 282; Ellis v. Little, 27 Kan. 707.

[5] Van Antwerp v. Hulburd, 8 Blatchf. 282.

[6] Bank v. Kennedy, 17 Wall. 19; Platt v. Crawford, 8 Abb. Pr. (N. S.) 297; Kennedy v. Gibson, 8 Wall. 498; Bank of Bethel v. Pahquioque Bank, 14 Wall. 383.

[7] Bank of Bethel v. Pahquioque Bank, 14 Wall. 383. The United States

Where the individual partners in a private bank were also directors in a national bank, and by reason of their position, became possessed of a large part of the means of the national bank which they used in their own business, and afterwards assigned all their property to trustees for the benefit of their creditors, and the national bank also suspended and went into the hands of a receiver, it was held that the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank as he might elect; but that purchases made and paid for out of the general mass could not be claimed by the receiver unless it could be shown that moneys of the bank in the general fund at the time of the purchase were appropriated for that purpose; that the receiver was not estopped by such election and taking from receiving the full benefit of the deed of trust in favor of the national bank.[1]

A receiver of a national bank is a "legal representative" thereof within the meaning of the statutory provisions authorizing the recovery of back interest.[2]

Such receiver has not power, without consent of the comptroller, to contract with an attorney to pay a contingent fee of one-half of the amount recovered in a suit on a debt due the bank.[3]

He is not accountable in equity to the owner of real estate for the rents thereof received by him as such receiver, and paid by him into the treasury of the United States, subject to the disposition of the comptroller of the currency.[4] He is authorized and required to collect and apply the assets of the bank to the payment of its debts, and to enforce the individual liability of the stockholders.[5] He can assert no rights against subscribers to stock which the banking corporation could not have asserted.[6]

The receiver of an insolvent national bank may maintain a suit in equity against all its shareholders to recover dividends that have been unlawfully paid to them out of the capital of the bank at times when the bank had earned no net profits, and when it was in fact insolvent. Such suit may be prosecuted without special order of the comptroller.[7]

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district court has power, under section 50 of the national banking act, to authorize the receiver of a national bank to compromise a debt. In the Matter of Platt, 1 Benedict. 534.

[1] Peters v. Bain, 133 U. S. 670.

[2] Barbour v. National Exchange Bank, 45 Ohio St. 133.

[3] Barrett v. Henrietta National Bank, 78 Tex. 222.

[4] Holz v. Jenks, 123 U. S. 297.

[5] Richmond v. Irons, 121 U. S. 27; Case v. Berwin, 22 La. An. 321; Movins v. Lee, 24 Blatchf. 291.

[6] Winters v. Armstrong, 37 Fed. R. 508. See section 481.

[7] Hayden v. Thompson, 71 Fed. R. 60 (U. S. C. C. App.)

The receiver of a national bank may maintain an action to recover damages caused by the negligence and inattention of the directors which resulted in loss of corporate funds. If the receiver be one of the directors and chargeable with such negligence, stockholders may maintain the action.[1]

Where there are sufficient funds to pay all claims against the bank, interest should be paid on them during the period of administration of the receiver before appropriating the surplus to the stockholders of the bank. An action of assumpsit, by the holder of a claim against the bank, to recover such interest, will lie against the bank and not against the receiver or the comptroller of the currency.[2]

A depositor in a national bank, when it suspends payment and a receiver is appointed, is entitled, from date of his demand, to interest upon his deposit.[3]

Section 481. **Of the Title to the Property of the Bank — Set-off and Equities.**—Upon his appointment the receiver takes such right and title to the assets of the bank as the bank itself had previous to the appointment. It is said that the receiver's title is, in all respects, similar in this regard to that of an assignee in bankruptcy. He is not a third person in the sense of commercial transactions, and, in consequence, he cannot avoid a pledge of assets of the bank which could not be avoided by the corporation itself. When, therefore, the bank has deposited notes constituting a part of its assets with a creditor as security for advances, the bank itself being concluded by the deposit or pledge, the receiver is not entitled to such notes, and cannot maintain an action therefor until the creditor or pledgee is made whole for his advances.[4] And the personal property and assets of the bank are still exempt from taxation under state laws, notwithstanding the appointment of a receiver, being regarded in legal contemplation as still belonging to the bank, to be administered according to law.[5]

The doctrine of set-off is applicable to receivers of national banks.[6]

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[1] Brinkerhoff v. Bostwick, 88 N. Y. 52.

[2] Chemical National Bank v. Bailey, 12 Blatch. 480.

[3] National Bank of Commonwealth v. Mechanics' National Bank, 94 U. S. 437.

[4] Casey v. La Societe de Credit Mobilier, 2 Woods, 77.

[5] Rosenblatt v. Johnston, 104 U. S. 462.

[6] Armstrong v. Warner, 49 Ohio St. 376; Wells v. Stout, 38 Fed. R. 807.

The receiver of a national bank takes its assets subject to all just claims and defences that might have been interposed against the corporation itself, and all liens, equities, and rights arising

Section 482. **Of Sales by the Receiver.**— A sale made by a receiver of a national bank, under an order of a court, is to all intents and purposes a judicial sale.[1] It has been held that the receiver cannot sell the real or personal property of the bank without an order of a court of competent jurisdiction.[2] Neither can he sell upon terms in conflict with the order; and, under an order permitting him to sell the property, he cannot exchange, or trade, or barter it away for other property.[3]

Although an action can be instituted against a national bank in its corporate capacity, notwithstanding the appointment of a receiver by the comptroller of the currency, nevertheless the property of the bank, which is attached at the suit of an individual creditor, cannot be subjected to sale in satisfaction of his demand as against the receiver, and it is the receiver's duty in such a case to apply to the court to dissolve the attachment.[4]

Section 483. **Of the Contracts of the Receiver.**—As the power of a receiver of a national bank appointed by the comptroller is limited, a person dealing with him in his official capacity is bound, as a matter of law, to have knowledge of his authority to act; and if contracts and agreements are entered into with the receiver in excess of his authority, as conferred by law, the parties contract at their own peril, and the estate of the bank cannot be charged for the default or liability of the receiver acting outside of his functions as receiver, and beyond the duties which it involves.[5] Accordingly, inasmuch as the receiver of a national bank cannot, as we have seen, lawfully exchange or trade away the property of a bank by virtue of an order to sell, he cannot make a binding executory contract for the exchange of the property; neither can he be held liable in an action for damages resulting from his failure, or refusal, to execute such a contract.[6] It is also clear that he cannot charge the bank by any such contract, or by any other undertaking whatever, unless authorized to do so by the provisions of the National

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by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency, and in contemplation thereof remain unimpaired.

Philler v. Yardley, 62 Fed. R. 645; s. c. 10 U. S. C. C. A. 562; Scott v. Armstrong, 146 U. S. 499; reversing s. c. 36 Fed. R. 63.

[1] *In re* Third National Bank, 9 Biss. 535.

[2] Ellis v. Little, 21 Kan. 707.

[3] Ibid.

[4] National Bank v. Colby, 21 Wall. 609. *Cf.* Security Bank v. National Bank of the Commonwealth, 2 Hun, 287.

[5] Ellis v. Little, 27 Kan. 707.

[6] Ibid.

Banking Act or the order of a court of competent jurisdiction obtained, in due form, upon the terms prescribed by the act.[1]

Section 484. **Of Suits by the Receiver — Jurisdiction of Courts — Practice — Miscellaneous Incidents.** — It is a general rule in these cases that the receiver may sue either in his own name, or in the name of the bank.[2] The statute expressly confers upon him the right to maintain actions in his own name to enforce the individual liability of the stockholders; and he is not required to proceed by bill in equity against all the delinquent shareowners in order to collect an assessment imposed by the comptroller, but he may bring separate actions at law against the shareholders individually.[3]

The receiver may, in like manner, sue in equity to set aside a transfer of stock made by a shareholder for the purpose of evading his individual liability. In such a case a letter from the comptroller of the currency, directing the receiver to institute proceedings to enforce the liability of shareholders under the act of congress, is competent evidence that the comptroller has determined it to be necessary to enforce such liability.[4] Being regarded merely as the instrument of the Comptroller, the receiver cannot, however, institute proceedings against the stockholders to enforce their personal liability, without the consent and direction of the comptroller, because it is for the latter to decide when it is necessary to institute such proceedings, and whether the whole or a part, and if only a part how great a part shall be collected.[5] And the determination of the comptroller as to the amount of the assessment is conclusive in an action by the receiver against a shareholder.[6] If, however, the individual liability of shareholders is sought to be enforced by a general creditor's bill, pursuant to the act of congress of June 30, 1876, the pendency of such suit constitutes a good plea in abatement to an action brought by a receiver, subsequently appointed by the comptroller to enforce the same liability.[7]

In suits brought by such a receiver to recover an indebtedness due to the bank, the debtor cannot, as has been already suggested,

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[1] Ellis v. Little, 27 Kan. 707. *Cf.* Platt v. Crawford, 8 Abb. Prac. (N. S.) 297.

[2] National Bank v. Kennedy, 17 Wall. 19; Kennedy v. Gibson. 8 Wall. 498; Chicago Fire-Proofing Co. v. Park National Bank. 145 Ill. 481; Movins v. Lee. 24 Blatchf. 291.

[3] Revised Statutes of the United States, section 5234.

[4] Bowden v. Johnson, 107 U. S. 251.

[5] Kennedy v. Gibson. 8 Wall. 498.

[6] Strong v. Southworth, 8 Benedict, 331.

[7] Harvey v. Lord, 11 Biss. 144.

inquire into the legality of the receiver's appointment; it is sufficient for the purposes of such suit that he is receiver in fact, since the action of the comptroller in making the appointment is conclusive, until set aside upon the application of the bank itself.[1]

In as much as the validity of the appointment of the receiver cannot be questioned collaterally, he need not, in suits against the shareholders, specifically aver the existence of all the conditions necessary to satisfy the comptroller that a receiver should be appointed.[2] And a general allegation of the appointment of the receiver, and of his taking possession of the assets, is sufficient, without setting forth in detail the circumstances leading to such action.[3] As regards the proof required upon the trial as to the appointment and authority of the receiver to sue, it would seem to be sufficient to produce a certificate from the comptroller, approved by the secretary, reciting the existence of all the facts necessary to authorize the appointment, and the fact of the appointment itself.[4]

The courts of the United States having statutory jurisdiction over the national banks, the fact that a receiver of such a bank is substituted as defendant in an action in a state court originally brought against the bank, does not enlarge the powers of the state court, or confer upon it a jurisdiction which it would not otherwise have over the bank itself. The state court having had no jurisdiction over the bank itself, acquires no power to give a judgment against the receiver.[5]

The receiver is regarded as an officer of the United States in such sense as to entitle him to maintain suits to recover an indebtedness due to the bank, or to recover assessments made by the comptroller in the federal court of the district in which the bank is located.[6] So, also, the jurisdiction conferred upon the district courts over all suits by or against national banks,[7] is sufficient to authorize the appointment of a receiver over a railway company at the suit of a national bank.[8]

Being officers of the United States receivers of national banks may sue in the federal courts, and this without regard to the citizenship

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[1] Cadle v. Baker, 20 Wall. 650.

[2] Ibid.

[3] Platt v. Crawford, 8 Abb. Prac. (N. S.) 297.

[4] Platt v. Beebe, 57 N. Y. 339.

[5] Cadle v. Tracy, 11 Blatchf. 101.

[6] Frelinghuysen v. Baldwin, 12 Fed. Rep. 395; Price v. Abbott, 17 Fed. Rep. 506; Platt v. Beach, 2 Benedict, 303.

[7] Revised Statutes of the United States, section 563.

[8] Fifth National Bank v. Pittsburg & Castle Shannon R. R. Co. 1 Fed. Rep. 190.

of the parties or the amount involved in the action.[1] But the federal courts do not have exclusive original jurisdiction of all actions by or against such receivers. State courts have concurrent jurisdiction with the federal courts.[2] When sued in a state court the receiver's right to remove the suit to the federal court has been both denied[3] and affirmed.[4]

In a leading case it is held that section 380 of the Revised Statutes which provides that certain suits shall be "conducted" by the attorneys in the districts where they are pending, is directory merely, and that the employment of private counsel by the receiver cannot be made a ground of defence to a suit brought by him.[5] Receivers of national banks may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship. And the provisions of the codes that every action must be brought in the name of the real party in interest, except in the case of the trustees of an express trust, or of a person authorized by statute to sue, do not apply to the receiver of a national banking association suing in a federal court held in a state which has adopted the reformed procedure, because the right of the receiver to sue is derived from the National Banking act.[6] Under section 1001 of the Revised Statutes, no bond for the prosecution of the suit, or to answer in damages or costs, is required on writs of error, or appeals, issuing from or brought to the supreme court of the United States, by direction of the comptroller of the currency, in suits by or against insolvent national banking associations, or the receivers thereof.[7]

The object of the National Banking act being to secure to the United States, a priority of lien upon the assets of the bank, for any deficiency in redeeming its notes, and then to secure the assets for ratable distribution among the general creditors, this object will not be allowed to be defeated by attachment suits against the bank after its insolvency.[8] And if the receiver brings suit to recover funds of the bank which have been attached after its insolvency, making parties in interest defendants, he is entitled to recover such assets notwithstanding a judgment in the state court, in favor of the attaching

[1] Armstrong v. Ettlesohn, 36 Fed. R. 209; Price v. Abbot, 17 Fed. R. 506; Armstrong v. Trautman, 36 Fed. R. 275.

[2] Thompson v. Schaetzel, 2 S. D. 393.

[3] Bird's Executors v. Cockren, 2 Woods, 32.

[4] Sowles v. Witters, 43 Fed. R. 700.

[5] Kennedy v. Gibson, 8 Wall. 498. Followed by supreme court of Missouri in State *ex rel.* Attorney-General v. Fliteraft, 36 S. W. R. 675.

[6] Stanton v. Wilkeson, 8 Benedict, 357. See also, generally, the cases cited in note 2, *supra*.

[7] Pacific National Bank v. Mixter, 114 U. S. 463.

[8] National Bank v. Colby, 21 Wall. 609; Harvey v. Allen, 16 Blatchf. 29.

creditors, under which the money is received by them before the recovery of the judgment in the receiver's suit.[1] So, also, where there is a levy by a state court, upon the property of the bank in satisfaction of a tax upon the bank, after insolvency, the sale of the property will, upon application of the receiver, be enjoined.[2]

The comptroller of the currency has no authority, it is said, to settle and compound suits instituted by the receiver, without consent of the court.[3]

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[1] Harvey v. Allen, *supra*.

[2] Woodward v. Ellsworth, 4 Col. 580.

[3] Case v. Small, 4 Wood, 78.

CHAPTER XV.

RECEIVERS OF REAL PROPERTY.

I.

RECEIVERS OF REAL PROPERTY IN GENERAL.

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II.

OF THE POWERS AND DUTIES OF RECEIVERS OF REAL PROPERTY.

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I.

Receivers of Real Property in General.

Section 485. **The General Rule in Actions at Law.** — The power to appoint a receiver, except where it is conferred by an enabling statute, is purely an equitable power, and, in order to induce the court to act there must exist a state of facts which, upon general principles of equity jurisprudence, will warrant the exercise of this power. There are, in the main, two general rules which govern equitable relief; first, there must exist in favor of the complainant some equity adequate in a court of conscience to authorize its interference; second, the claim must be based upon legal title, and that title must first have been established in a court of law. Moreover, a court of equity will not act where a court of law offers a full and adequate relief. Hence, it may be stated as a general rule, that, as against a defendant in possession, under claim of title, equity will not interfere, by appointing a receiver, in favor of a plaintiff setting up a mere legal title. There must be some special circumstances of imminent danger of loss, or of irreparable injury, or fraud, to warrant the court in interfering before the plaintiff's title has been established at law.[1] Accordingly, in order to obtain this relief, the plaintiff must make out a case of judicial necessity, imminent danger, or fraud, unless the court takes possession. This must be established with such a reasonable measure of certainty that the court can be satisfied of the fact. An affidavit upon information and belief is not, therefore, as a rule, sufficient;[2] and where the plaintiff has not established his title at law, and there is no equity by which the court can affect the conscience of the de-

[1] Owen v. Homan, 3 Mac. & G. 378, affirmed, 4 H. of L. Rep. 997; Lloyd v. Passingham, 16 Vesey, 59; s. c. 3 Mer. 697; Bainbrigge v. Baddeley, 3 Mac. & G. 414; Mordaunt v. Hooper, Amb. 311; Lancashire v. Lancashire, 9 Beav. 120; Skinner's Co. v. Irish Society, 1 Myl. & Cr. 162; Talbot v. Hope Scott, 4 Kay & J. 96; Municipal Commissioners of Carrickfergus v. Lockhart, Ir. Rep. 3 Eq. 515; Parkin v. Seddons, L. R. 16 Eq. 34; Willis v. Corlies, 2 Edw. Ch. 281; Gregory v. Gregory, 33 N. Y. Super. Ct. 1; Vause v. Woods, 46 Miss. 120; Schlecht's Appeal, 60 Pa. St. 172; Chicago & Allegheny Oil, etc., Co. v. U. S. Petroleum Co. 57 Id. 83; Emerson & Wall's Appeal, 95 Id. 258; Clark v. Ridgely, 1 Md. Ch. 70; Cofer v. Echerson, 6 Iowa, 502; Rollins v. Henry, 77 N. C. 467; Twitty v. Logan, 80 Id. 69; DeWalt v. Kinard, 19 S. C. 286.

[2] Davis v. Reavis, 2 Lea (Tenn.) 649; Lloyd v. Passingham, 16 Ves. 59.

fendant, there being no privity between the parties, if the defendant is simply a wrongdoer at law, the court will not interfere except it be in some very exceptional cases.[1] In accordance with this view, where a bill was filed by the purchaser of land at a sheriff's sale, praying an injunction to restrain one, who entered under the former owner, from cultivating turpentine trees, on the allegation of irreparable mischief from the defendant's insolvency, and it was made to appear that the defendant entered by virtue of a lease of the trees for making turpentine, executed before the sheriff's sale, it was held that it would be inconsistent with the relief sought by the bill to decree the appointment of a receiver of the rent to secure its payment to the reversioner.[2]

Section 486. **The Exceptions to this Rule.**— Such being the general rule, there are two well recognized exceptions to it, and when the case comes fairly within either of these, a court of equity will exercise its discretion in appointing a receiver. These exceptions, are, first, when the plaintiff's title is so clear that there is reasonable probability of his success in a court of law; and, second, when the property, or its rents and profits — the subject of the suit — seem to be in imminent danger, in case the court does not interfere.[3] The courts, as in other classes of cases which affect the legal title to real estate, incline to attach the utmost weight to the first of these exceptions, and it is the rule that courts of chancery will not interfere unless the plaintiff's title is beyond doubt, and unless the facts which establish the title are made clearly to appear and to appeal to the conscience of the court.[4] Again, it is held that when the plaintiff's title is dependent on the construction of written instruments, the face or intent of which are involved in doubt, the court will generally decline to interfere.[5]

There must, also, be some element of danger to the property, and in the absence of it the court will not, in general, consent to act. Thus where certain trustees held real property in trust for an unincorporated religious society, which, owing to a dissension that arose, separated into two parties, one of which, claiming to be entitled to the property, filed a bill for that purpose and asked for a receiver, and there was no allegation of any danger to the property from the

[1] Talbot v. Hope Scott, 4 Kay & J. 96.

[2] Burns v. Campbell, 3 Jones Eq. (N. C.) 410.

[3] Bainbrigge v. Baddeley, 3 Mac. & G. 414; Mordaunt v. Hooper, Amb. 311; Mayo v. McPhaul, 71 Ga. 758.

[4] Bainbrigge v. Baddeley, 3 Mac. & G. 414; Cofer v. Echerson, 6 Iowa, 502; Gregory v. Gregory, 33 N. Y. Super. Ct. 1.

[5] Owen v. Homan, 3 Mac. & G. 378, affirmed, 4 H. of L. Rep. 997.

defendants, or any apprehension of injury in consequence of the possession of the other party, nor was it shown that the defendants were irresponsible or unable to make good any loss of rents, the application was refused.[1]

Section 487. **Of Relief Upon Purely Equitable Grounds.**— At one time the English court of chancery refused to grant the extraordinary remedy of a receiver in aid of one claiming title to real property, being out of possession, unless his title was an equitable one.[2] And, latterly, this doctrine has been extended to all cases where there is some equity by which the court can affect the conscience of the defendant. These equities are the same as those which justify equitable reliefs in general — fraud, undue influence, to prevent vexatious litigation, in aid of trusts, dower interests, equitable encumbrances, and the like. But the statutory notice of *lis pendens* has produced a modification of the principle, and it has been held that, if the filing of such a notice will effectually protect the plaintiff's equitable interest in the property, a receiver will not be appointed.[3]

Section 488. **Of Relief Upon the Ground of Undue Influence or Fraud.**—Where the defendant has obtained possession and control of the subject-matter of the litigation by fraud, undue influence or any other unconscionable means, a strong case is presented for the appointment of a receiver. Thus where a suit was commenced to set aside a conveyance of certain real estate, upon the ground of fraud and undue influence in the execution of the instrument, and it appeared, *prima facie*, and from the papers in the suit, probable that the plaintiff would recover, a receiver was appointed.[4] The order in this case was subsequently modified, in order to save expense, by directing the payment of the annuity in arrears, and that the defendant give security for future payments. The same principle was applied where the grantor was a person of unsound mind, and incapable of managing her own affairs to the knowledge of the defendant, who was insolvent except as far as the particular property was concerned, and there was no consideration for the deed.[5] And where the grantor was a person of weak intellect,

[1] Willis v. Corlies, 2 Edw. Ch. 281.

[2] Carrow v. Ferrior, L. R. 3 Ch. App. 718; Talbot v. Hope Scott, 4 K. & J. 96; Jones v. Jones, 3 Meriv. 161.

[3] Gregory v. Gregory, 38 N. Y. Super. Ct. 4.

[4] Huguenin v. Baseley, 13 Ves. 105; Stitwell v. Williams, 6 Madd. 49; affirmed, *sub nom.*, Stilwell v. Wilkins, Jac. 280. *Cf.* Vann v. Barnett, 2 Bro. C. C. 158.

[5] Mitchell v. Barnes, 23 Hun, 194.

intemperate in his habits and young, and the consideration was grossly inadequate, and it appeared that at the time of making the conveyance he was under the impression that he was conveying a life interest only, none of the allegations being denied by the defendants who merely set up ignorance of them, a receiver was appointed.[1]

Section 489. **Of Relief to Prevent Litigation, and in Cases of Insolvency.**—A court of equity may, in a proper case, where there is a contest over property to which the defendant shows no title, and where, owing to the occupancy of numerous tenants, there is a probability of an extended and vexatious litigation, take possession of the property by its receiver *pendente lite*.[2] And where the answer of the defendant in a creditor's suit suggests that there will be no personal property to satisfy the judgment, a receiver of the realty may be appointed in the first instance, as against the defendant in possession, where he is also receiving the rents and profits.[3] This is an extreme case, and it is probable that it would not be followed, even in England, except under precisely similar circumstances; and particularly where there are judgment creditors in possession of the realty, the appointment will be made without prejudice to their rights.[4]

Section 490. **Of Relief in Aid of Dower.**—Owing to the inadequate remedies at law to enforce the dower interests of a widow, equity at an early day assumed jurisdiction of the matter; and, accordingly, applications for a receiver of the property of a deceased person whose wife is entitled to dower, pending proceedings to set aside the dower, were, in general, favored by the court, in virtue of the presumed equities of the case. In accordance with this view courts of equity have appointed a receiver of property, subject to dower, where it appeared that it was in the possession and under the control of an insolvent, who had also taken benefit of the insolvency laws, and there was a likelihood of danger of loss of rents.[5] But where it did not appear that there was any danger of loss, although the rents which were claimed as subject to the dower were being collected by insolvent persons, inasmuch as it was not shown that the courts of law did not afford adequate relief, a receiver was refused.[6] And, as a general rule, in all cases where danger to the property which is the subject-matter of the contest,

[1] Stilwell v. Wilkins, Jac. 280.
[2] Cole v. O'Neill, 3 Md. Ch. 174.
[3] Jones v. Pugh, 8 Ves. 71.
[4] Davis v. Duke of Marlborough, 1 Swanst. 74.
[5] Chase's Case, 1 Bland, 206.
[6] Knighton v. Young, 23 Md. 359.

is set up as a ground for the appointment of a receiver, it is not sufficient merely to allege the danger, but facts must be properly pleaded from which the court can conclude that there is danger, in accordance with the well-recognized rule of pleading that facts, and not conclusions of law, shall be pleaded.[1] In a case in North Carolina it was held that a receiver could not, as a general rule, be appointed in proceedings to establish a will of real estate.[2]

Section 491. **Of Relief in Cases of Trusts and Wills.**—Equity will interfere by appointing a receiver over real property which is the subject of a trust in favor of a *cestui que trust*, where the rents have not been collected on account of disputes and dissensions among the trustees as to the proper management of the property, and the receiver will be empowered to collect the rents due and to receive rents in future as they accrue.[3] But the mere fact that, in a suit to establish a trust, the answer denies the trust will not warrant the appointment; there must be shown some substantial reason why the property, if left in the hands of the defendants, will be subject to danger or loss.[4] In an English case where the trust was established by will, and the *cestuis que trust* filed a bill to establish the will and enforce the trust and for an accounting, a receiver was appointed, it being clear that the holders of the legal estate were acting in disregard of the testator's intentions.[5] And the same relief was granted where the bill alleged that the rents were not being collected, and that certain mortgagees were threatening to commence proceedings to enforce their liens unless a receiver was appointed.[6] But where the heir had obtained possession the court refused to dispossess him by making the appointment, where the trusts were created by a will which had not been proven and was not admitted by the answer.[7] And where a trust was created by deed in favor of the grantor's wife for life, and on her death to his children for life, equally to share in the rents and profits, and, the wife having died, the donor had taken possession and applied the rents to his own use, in the absence of any allegations that he was insolvent or that the rents might be lost, it was held that sufficient ground for the relief was not presented.[8]

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[1] Knighton v. Young, 22 Md. 359.

[2] Bryan v. Moring, 94 N. C. 694 (1886); s. c. 5 Am. Prob. Rep. 12.

[3] Wilson v. Wilson, 2 Keen, 249. *Cf.* Chase's Case, 1 Bland, 213.

[4] Hamburgh Manufacturing Co. v. Edsall. 7 N. J. Eq. 298; s. c. 8 Id. 141.

[5] Podmore v. Gunning, 5 Sim. 485. But *cf.* Bryan v. Moring, 94 N. C. 694. (1886.)

[6] Hart v. Tulk, 6 Hare, 611.

[7] Dobbin v. Adams, 8 Ir. Eq. 157.

[8] Clark v. Ridgely, 1 Md. Ch. 70.

Section 492. **Of Relief in Aid of Annuitants.**—Where the claims of creditors and others are made an annual charge upon real property, a receiver of the same may be appointed,[1] and this is especially the rule where the annuity is in arrears and the property does not afford sufficient security,[2] or if it be in arrears, and there is doubt as to whether there is a remedy at law.[3] But the receiver will not be ordered to account for the rents to a person whose claim is not a charge upon the land.[4] And where a conveyance from a father to his children was claimed to have been fraudulently obtained, and that they had refused to pay him an annuity charged on the land, it was deemed, in a suit brought by the father to set aside the conveyance, a fit case for the appointment unless the annuity was paid without delay.[5] Where it appeared, in a suit on behalf of a number of grantees of rent charges on the same property, who had power of distress and entry, that the property was untenanted and that it was impossible to obtain tenants, for want of protection against the powers of several grantees of the rent charges, a receiver was appointed to protect the property pending the litigation[6]. But in a later case the power of distress was considered ample, and relief in equity was refused.[7] And where the annuity was charged upon certain property by name and upon all other property generally, and a receiver had been appointed over the specified property because the annuity was in arrears and the security insufficient, the receivership was extended to other property subsequently discovered, subject to the claims of other creditors entitled to a priority.[8] So, also, where an annuity was charged upon real property by will, which was subject to charges and incumbrances entitled to a priority, a receiver was refused pending a contest over the validity of the will.[9]

When liens charged on lands are sought to be enforced in equity, and, as a means of making the security available and sufficient, the lands are placed in the hands of a receiver, the rents and profits realized become a primary fund, to be first applied to the extinguish-

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[1] Hayden v. Shearman, 2 Ir. Ch. (N. S.) 137; Buxton v. Monkhouse, G. Coop, 41.

[2] Kelly v. Butler, 1 Ir. Eq. 435.

[3] Beamish v. Austen, Ir. Rep. 9 Eq. 361.

[4] Mayor of Baltimore v. Chase, 2 Gill. & S. 376.

[5] Probasco v. Probasco, 30 N. J. Eq. 108.

[6] White v. Small, 22 Beav. 72, 75.

[7] Sollory v. Leavor, L. R. 9 Eq. 22. In this case the application was made by an annuitant whose annuity was in arrears; it does not appear that there were any others interested.

[8] Lyne v. Lockwood, 2 Moll. 498.

[9] D'Alton v. Trimleston, 2 Dru. & War. 531.

ment of the liens in the order of their precedence. If these are insufficient the proceeds of the sale of the lands are to be applied in the same way, until the liens are extinguished and the costs paid, or until the fund is exhausted.[1] And a receiver may be appointed on the application of a party entitled to an equitable rent charge, as against a person who subsequently takes the legal estate subject to his interest and refuses to satisfy it.[2] But a legatee, whose legacy is a charge on real property subject to prior liens, is not entitled to a receiver, because the proceeds are applied to the payment of those liens.[3] Where the party in whose favor an annuity is charged upon real property has obtained a decree for the sale of the property in order to raise certain arrears, and the defendant seeks to prevent the sale and the enforcement of the decree, and refuses to comply with the direction of the court to produce his title deeds, a receiver may be appointed.[4] And where certain children were allowed, on the settlement of the estate of their ancestor, certain portions raised out of a term of years, and had obtained a decree of sale for that purpose, they were allowed a receiver as against a life-tenant who obstructed the enforcement of the decree.[5] So, also, when a receiver of the rents and profits is asked for by an equitable incumbrancer who has no right of entry or possession, and the court is satisfied that the relief will be obtained by the final decree, it will make the appointment when there is danger of losing the rents;[6] and the fact that the plaintiff may have execution against the property, by writs of *elegit*, shows sufficient interest to justify the appointment.[7] Where a clergyman of the established church of England had made a debt a charge upon his benefice receivers were appointed over the same;[8] and this may be done in favor of the annuitant in preference to later judgment creditors.[9]

Section 493. **Of the Appointment as Against a Life Tenant.**— It may be observed that there is, in general, nothing peculiar in the nature of the various estates in real property which is sufficient to

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[1] Milhous v. Dunham, 78 Ala. 48, 59.

[2] Pritchard v. Fleetwood, 1 Meriv. 54.

[3] Faulkner v. Daniel, 3 Hare, 204 (n.)

[4] Shee v. Harris, 1 Jo. & Lat. 91. *Cf.* Brigstocke v. Mansel, 3 Madd. Ch. 47.

[5] Brigstocke v. Mansel, 5 Madd. Ch. 32.

[6] Davis v. Duke of Marlborough, 2 Swanst, 138.

[7] Davis v. Duke of Marlborough, 1 Swanst. 74.

[8] White v. Bishop of Peterborough, 3 Swanst. 109; Silver v. Bishop of Norwich, Id. 112 (n.)

[9] Battersby v. Homan, 2 Ir. Ch. (N. S.) 232.

affect the discretion of the court in appointing a receiver, but for the sake of convenience, some of the cases involving the estate of a life-tenant will be collected here.[1]

Where the tenant for life has allowed the taxes and assessments levied upon the premises to be in arrears, a court may appoint a receiver of so much of the rents and profits as may be necessary to pay the taxes and assessments past due, and such an appointment may be made in the alternative, to take effect unless the defendant pay off the liens within a certain time;[2] and where the tenant of the life-tenant continued in possession claiming to hold as heir, a receiver was appointed in a suit against him for an accounting of the rents accrued subsequent to the death of the life-tenant.[3] But in an early case, a receiver was refused to an administrator where the prayer of the bill was that the life-tenant be directed to make repairs, or in the alternative for a receiver who should have power to make them, the ground of refusal being that there was no precedent for the relief asked.[4]

Section 494. **Of the Appointment as Between Tenants in Common.**— A court of equity, following the general principles of a court of law, is in general little disposed to interfere between tenants in common or joint tenants; and in order to invoke the aid of this court, there must be a predicament of facts which appeals to the conscience of the court. These facts are, generally speaking, that some of the tenants have possession exclusive of the others, or are receiving the rents and applying them to their own use, and are insolvent and would be unable to respond for a deficiency on an accounting, or that the property is of such a nature that its chief value consists in its continual working, and that this would be prevented by disputes about the management.[5] As already stated, when one or more co-tenants occupy and enjoy the common property to the exclusion of the others, a receiver may be appointed on the application of those excluded.[6] Thus, in Williams v. Jenkins,[7] the complainant was owner of one-third of certain property, consisting of saw and grist mills, the defendants were in possession and managed

[1] See cases cited in section 492, *supra*.

[2] King v. King, 41 N. Y. Super. Ct. 516; Carter v. Youngs, 42 Id. 418; Cairns v. Chabert, 3 Edw. Ch. 312. The relief may be granted in favor of the remainderman. *In re* Fowler, L. R. 16, Ch. D. 723.

[3] Anon. Amb. 311 (n.) 1.

[4] Wood v. Gaynon, Amb. 395.

[5] White v. Small, 22 Beav. 72. See also section 492, *supra*.

[6] Vaughan v. Vincent, 88 N. C. 116; Cassetty v. Capps, 3 Tenn. Ch. 524; Hargrave v. Hargrave, 9 Beav. 549; Evelyn v. Evelyn, 2 Dick. 800; Street v. Anderton, 4 Bro. Ch. 414.

[7] 11 Ga. 595.

the property badly with intent to defraud him, and they were insolvent; there was, moreover, a vendor's lien on the property which was worth more than the amount of profits due the complainant; he had, furthermore, offered to manage the property individually, giving his co-tenants a bond, or to allow them to run it exclusively on the like terms, which was declined. In this state of the matter the court appointed a receiver.[1]

But where the application of a receiver was founded on affidavits of improper management and of a reservation of the profits not amounting to a case of exclusion, which was met by counter affidavits of a balance due on an unsettled account, and of an agreement to a reference to arbitration and of a denial of improper management, the application was denied.[2] And in a later case, where it appeared that one of the co-tenants had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, notwithstanding he had agreed to let the complainants receive the whole of the rent until they had been repaid certain sums due them from the defendant, the court refused to grant the relief, holding that the notice was not an exclusion, because the tenants could pay the whole of the rents to the complainant, or at least their share.[3]

The order appointing a receiver will sometimes be in the alternative that, unless the co-tenant give security to account for the portion of the rents due his co-tenant, a receiver will be appointed.[4] A receivership, instituted for the benefit of infant tenants in common, will not necessarily terminate upon one of the infants coming of age.[5]

Section 495. **Of Receivers of Mines.**— Cases involving the ownership and control of mines, collieries and the like, present, on account of their peculiar nature, some grounds for the exercise of the extraordinary jurisdiction of the court of chancery in the appointment of a receiver, when there is a disagreement as to the management of the property. The principal reasons for such an appoint-

[1] In this case one of the grounds of defence was that there was an adequate remedy at law by a writ of partition. In regard to this the court said: "Concede that the complainant in the case might have a writ of partition at law, for his share of the property, what adequate remedy has he at law, in the meantime, for the profits of the mill, while in the possession of the defendants, who are insolvent?" Compare, on this point, Tyson v. Fairclough, 2 Sim. & St. 142.

[2] Millbank v. Revett, 2 Meriv. 405.

[3] Tyson v. Fairclough, 2 Sim. & St. 142.

[4] Street v. Anderton, 4 Bro. Ch. 414.

[5] Smith v. Lyster, 4 Beav. 227; s. c. 10 L. J. (N. S.) Ch. 344.

ment are that property of this nature derives its chief value from the continued working of the mine, a cessation in which might lead to considerable loss. Moreover, such property cannot conveniently be controlled by a large number of persons, each employing independently a manager and workmen. To avoid such complications and embarrassments a receiver has been appointed of a coal mine,[1] and also of a gold mine, where some of the owners, being of doubtful responsibility, were taking away the product.[2]

Section 496. **The Extent of the Receivership in These Cases.**—Where the plaintiff claimed to be a tenant in common with the defendant who was in possession of the whole estate, a receiver of his moiety was granted, and also an injunction restraining his co-tenants from collecting the rents of such share, and directing the tenants to attorn to the receiver.[3] And where the legal title to certain premises stood in a trustee for the benefit of a number of *cestuis que trust*, and the trustee put one of the *cestuis que trust* in possession, the court appointed a receiver in behalf of the other tenants, as to their shares only, inasmuch as their equitable co-tenant was entitled to the possession of his own share,[4] but where the conduct of one in possession amounts to an exclusion of his co-tenants, the receivership may be extended so as to include the entire property.[5]

Section 497. **Of Receivers in Partition Suits.**—Whenever it appears, during the prosecution of a suit in partition between tenants in common or joint tenants, that a receiver is necessary to protect the interests of all the parties, the court will, upon proper application, appoint a receiver of the property.[6] And where, in such a suit, the defendants dispute the title of the plaintiff and endeavor to complicate the matter by occasioning delays in the accounting for rents and profits, a good case for the exercise of the jurisdiction by a court of equity is presented.[7] So, also, where one co-tenant refuses to unite with the others in renting a portion of the property, and interferes with the collection of the rents of the other parties, a receiver may be appointed.[8] And where the parties to a parti-

[1] Jefferys v. Smith, 1 Jac. & W. 298. *Cf.* section 494, *supra*.
[2] Parker v. Parker, 82 N. C. 165.
[3] Hargrave v. Hargrave, 9 Beav. 549.
[4] Sanford v. Ballard, 30 Beav. 109. *Cf.* Knowles v. Clayton, 2 L. J. Ch. 181.
[5] Sandford v. Ballard, 33 Beav. 401,
[6] Text cited and affirmed in Ames v. Ames, 148 Ill. 321; Weise v. Welsh, 30 N. J. Eq. 431; Goodale v. Fifteenth District Court, 56 Cal. 26.
[7] Duncan v. Campau, 15 Mich. 415.
[8] Pignolet v. Bushes, 28 How. Pr. 9.

tion suit agree, at the outset, to have a receiver, if the appointment seems reasonably necessary to preserve and maintain the rights and interests of the parties, the court will act.[1]

Such a receiver may sue one of the owners, to whom he liened the property for the rent.[2]

Section 498. **Of Receivers in Aid of a Mechanic's Lien.**—There are reported two *nisi prius* cases in New York, where an application was made for the appointment of a receiver of the rents and profits of premises upon which there was a mechanic's lien which the owner was endeavoring to enforce. In the earlier case,[3] it was held that a receiver might be appointed, but that, where a collateral action was pending to recover the same indebtedness, the application would be refused, unless that proceeding was discontinued. In the other case[4] it was held, on the contrary, that such a lien is of no higher character than a judgment, and that after the filing of the notice, the debt must be proved in the proceedings to foreclose.

Section 499. **Of Receivers in Actions of Ejectment.**—Under the general rule already stated a receiver will not be appointed in an action to recover real property unless some equitable ground for the interference of the court be made to appear, for this would be depriving the defendant of his property without trial or judgment, and the mere fact that the plaintiff has a valid legal title is not, as we have seen, a sufficient reason for granting the relief.[5] But where the plaintiff has a good *prima facie* title, and there is imminent danger of loss of the rents and profits, by reason of the mismanagement of the defendant who is in an insolvent condition, a receiver may be appointed.[6] So, also, where the action was brought to recover possession of real property, and it appeared that there was probable danger of the rents being lost, and the plaintiff set up a *prima facie* title, a receiver was appointed although the defendant was in possession;[7] but mere difficulty in collecting

[1] Bowers v. Durant, 2 N. Y. St. Rep. 127.

[2] Smith v. Laville, 34 N. Y. S. 695.

[3] Webb v. Van Zandt, 16 Abb. Pr. 314 (n.) (1863).

[4] Meyer v. Seebold, 11 Abb. Pr. (N. S.) 326 (n.) (1871).

[5] People v. Mayor of New York, 10 Abb. Pr. 111; Thompson v. Sherrard, 35 Barb. 593; s. c. 22 How. Pr. 155; Guernsey v. Powers, 9 Hun. 78; Burdell v. Burdell, 54 How. Pr. 91; Corey v. Long, 12 Abb. Pr. (N. S.) 427; Mapes v. Scott, 4 Bradw. 268; Rollins v. Henry, 77 N. C. 467; Bateman v. Superior Court, 54 Cal. 285; Kron v. Dennis, 90 N. C. 327. *Cf.* Ireland v. Nichols, 37 How. Pr. 222.

[6] American Freehold Land Mortgage Co. v. Turner, 95 Ala. 272; Payne v. Atterbury, Harring (Mich.), 414; Ireland v. Nichols, 37 How. Pr. 222; s. c. 1 Sweeney, 208.

[7] Scott v. Scott, 13 Ir. Eq. 212.

the rents would not justify the granting of the relief.[1] And in an action to recover possession of certain premises in New York, on the ground that the proceedings by which the title of the plaintiff's ancestor had been divested, were void for fraud, mistake and want of jurisdiction, and the defendants were irresponsible and were collecting the rents, which would thereby be lost, and the premises were in a ruinous condition for want of repairs and seemed likely to continue to deteriorate if they remained under the control and in the possession of the defendants, owing to their incapacity and neglect, a receiver was appointed.[2] The appointment of a receiver in these cases is considered to be a part of, and auxiliary to the original action, and not a special proceeding, or an independent action.[3] Accordingly, where a suit in equity was commenced, seeking an injunction and a receiver and a decree to declare and quiet the plaintiff's title, by a devisee, who alleged that the defendant had unlawfully entered into possession and continued so to hold, and was irresponsible, thereby depriving the complainant of all means of support, the court refused to appoint a receiver, on the ground that full and adequate relief could be obtained in a court of law.[4] The relief will, of course, be refused if it is doubtful whether the plaintiff can recover at law.[5] And where the plaintiff, in an action to recover certain land, takes possession of a portion of the premises and keeps the defendants out of possession although they claim title, the suit being in *forma pauperis*, a receiver may be appointed over the property and the rents, *pendente lite*, on the application of the defendants.[6]

Section 500. **Of Receivers After Recovery of a Judgment in Ejectment.**—As soon as the plaintiff, in an ejectment suit, has obtained a verdict and judgment in his favor, his title in a court of law is established, and if, for any reason, he is kept out of the possession, there are strong grounds on which a court of equity will entertain an application for a receiver. In such a case a motion for a new trial, or the taking of an appeal or other proceedings to continue the litigation, if it can be shown that the real object is delay, will warrant the interference of the court.[7] Thus where the chief value of lands recovered was the income derived from the sale of the waters of mineral springs situated thereon, and the defendant

[1] *In re* Madden, 8 L. R. (Ir.), 172.
[2] Rogers v. Marshall, 6 Abb. Pr. (N. S.) 457.
[3] Whitney v. Buckman, 26 Cal. 447.
[4] Pfeltz v. Pfeltz, 14 Md. 376.
[5] Cofer v. Echerson, 6 Iowa, 502.
[6] Horton v. White, 84 N. C. 297.
[7] Frisbee v. Timanus, 12 Fla. 300.

made a motion for a new trial, and it appeared that he was wasting the waters and impairing their value and was irresponsible, a receiver was appointed.[1] And a receiver will be appointed by a state court where the plaintiff has recovered and the defendant has obtained a writ of *certiorari*, to remove the proceedings into the United States court, in a case where the property was depreciating in value and there was no judge of the United States court in office, and the execution of the judgment was suspended in order to avoid a conflict of jurisdiction, the proceedings having the appearance of being instituted for delay.[2]

Section 501. **Of Receivers as Between Lessor and Lessee.**— The courts, in exercising their discretion in the appointment of a receiver, are not influenced by the quantity of the estate in the defendant; it matters not whether the defendant has a fee, or an estate less than a fee, if it be in other respects a case for the interference of a court of equity; and, hence, where a party is clothed with title and possession by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless some urgent and peculiar circumstances, and the burden is upon the plaintiff to show a clear right in such a case, or a *prima facie* right, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere.[3] The mere fact of the difficulty of enforcing the ordinary legal remedies to compel the payment of rent due is not, in itself, a sufficient reason for appointing a receiver.[4] And where the lessee of certain premises had the right to bore for and take oil therefrom, one-fourth of the product going to the lessor for rent, and the latter brought suit at law to forfeit the lease for breaches of the covenant, praying, *inter alia*, that the defendant be restrained from taking and disposing of oil obtained on the land, and for the appointment of a receiver of the defendant's portion of the oil until the suit at law was determined, the relief was refused.[5]

But where a leasehold interest was conveyed to a trustee to secure an indebtedness due to certain creditors of the lessee and assignor, and the trustee declined to act, a receiver was appointed to execute the trusts.[6] So, also, where one, with the consent of the owner of the leasehold, advanced money to redeem the land from

[1] Whitney v. Buckman, 26 Cal. 447.
[2] Frisbee v. Timanus, 12 Fla. 300.
[3] Chicago & Allegheny Oil, etc., Co. v. United States Petroleum Co. 57 Penn. St. 83.
[4] Cremen v. Hawkes, 8 Ir. Eq. 153, affirmed, Ibid, 503.
[5] Chicago, etc., Oil, etc., Co. v. United States Petroleum Co. *supra*.
[6] Taylor v. Emerson, 6 Ir. Eq. 285.

eviction under a judgment, a receiver may be appointed for his protection, on the ground that he has an equitable lien, when the landlord threatens to evict him on account of non-payment of rent.[1] And, where the lessee is a minor and an eviction is threatened for non-payment of rent, the relief will be granted where it is apparently for his benefit.[2]

A receiver will be appointed where the term has expired and the tenant, who is insolvent, wrongfully withholds the possession;[3] and where a receiver has been appointed over a leasehold interest and the term expires, it has been held that the landlord may re-enter into possession without first obtaining leave of the court.[4] If, in such, a case, a motion is made to discharge the receiver as to that land, the defendant should be served with notice of motion;[5] and, in an action by the landlord for rent, it was held that the order of the court requiring the tenant to deliver possession to its receiver followed by such delivery, would constitute a lawful eviction, and that, if the landlord had not been a party to such action, the tenant might be required to show, in defence, that the order was rightfully made; but if the landlord were a party, he would be estopped from questioning the validity of the order.[6]

Section 502. **The Right of an Assignee of a Lease to a Receiver.**—In a case in New York it appeared that a lease for ten years had been executed in which the lessor agreed to make certain alterations. Subsequently the lessor assigned the lease to the plaintiff and covenanted to make all repairs and to pay all sums due on mortgages, or for taxes. The lessor did not make the alterations, and the lessee refused to take possession. There was a mortgage on the premises, which, at the time of the application for the receiver, was liable to be foreclosed, and there were also two years taxes unpaid. The assignee made application that the defendants, who were holders of the fee in remainder, should convey it to a receiver to be taken possession of and leased by him, and out of the rents to have the surplus, after paying all liens, applied to the payment of the rents due and to become due. The application was denied on the ground that the assignment created no lien upon the estate in remainder; and that the fact that the refusal of the original lessee to occupy under the lease might be ground for the plaintiff's

[1] Fetherstone v. Mitchell, 9 Ir. Eq. 480.
[2] Whitelaw v. Sandys, 12 Ir. Eq. 393.
[3] Nesbitt v. Turrentine, 83 N. C. 535.
[4] Britton v. McDonnell, 5 Ir. Eq. 275.
[5] Johnson v. Henderson, 8 Ir. Eq. 521.
[6] Mariner v. Chamberlain, 21 Wis. 251.

taking proceedings to get possession because the lease was void, which could have been done at law, constituted no ground for any relief in equity, separate from so taking possession.[1]

Section 503. **Of Receivers as Between an Heir and a Devisee.** —Applications are often made to the court for a receiver by one heir, or devisee, as against the other, where there is a contest as to the validity of the will or effect of the devise, and the one or the other has obtained possession of the property. In all these cases the title of either depends essentially upon the title of the other, as it would be adjudicated in a court of law, and, hence, the court is adverse to granting the relief except in the cases in which it would grant a similar application in aid of an ejectment suit, and it will pursue this policy without regard to which party has obtained possession.[2]

In Earl of Fingal v. Blake,[3] it appeared that the heir had obtained possession and was contesting the will, but it also appeared that he was committing waste, by cutting down trees used partly for ornament, and had waived an issue *devisavit vel non*, which had been ordered on his own application. Moreover, the court was satisfied that he was shut out from the inheritance upon the merits, and so was a trespasser. It therefore granted the application for a receiver. But an application would be refused where a verdict had been rendered in favor of the heir, although a new trial has been directed.[4] And where certain devisees and an heir obtain possession, a receiver will not be granted in favor of another devisee, in a case wherein the validity of the will is disputed and no danger or injury to the property is shown.[5] So, also, where several claimants set up conflicting titles to certain property as heirs at law, and their rights can be determined at law, equity will not appoint a receiver.[6] But where the next of kin filed a bill praying for the appointment of a receiver of the estate of a deceased person, on the ground that the defendants, claiming to be heirs, were opposing the plaintiff's application for letters of administration, but not giving the grounds of such opposition, a demurrer to the bill was sustained, for the reason that the bill did not allege that letters could not be obtained, and so showed no equity for the relief.[7]

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[1] Huerstel v. Lorillard, 7 Robert (N. Y.), 251.

[2] Knight v. Duplessis, 1 Ves. 324; s. c. 2 Id. 360; Schlecht's Appeal, 60 Pa. St. 172.

[3] 2 Moll. 50. See, also, s. c. 1 Id. 118.

[4] Lloyd v. Trimleston, 2 Moll. 81.

[5] Clark v. Dew, 1 Russ. & M. 103. *Cf.* Dobbin v. Adams, 8 Ir. Eq. 157.

[6] Carrow v. Ferrior, L. R. 8 Ch. App. 719.

[7] Jones v. Jones, 8 Meriv. 161.

Section 504. **Of Receivers as Between Husband and Wife.**— In these cases the same rules apply. Thus where certain funds are committed to the care of trustees for the sole use and benefit of a wife, and they, at the instance of a husband, and in violation of their trust, invest the funds in real property, upon which the husband expends considerable money in repairs and improvements, a receiver of the rents and profits will not be appointed, upon the application of the husband in a bill filed by him for reimbursement.[1]

Where one party, upon marriage, had performed his part of an ante-nuptial contract, a receiver was appointed of properties which the other ought to have put in settlement.[2] So, likewise, where husband and wife agree to share and enjoy certain real estate in common, and the wife subsequently secures a divorce, a receiver will be appointed, on the wife's application, where the property is in the sole occupancy of the husband, who is insolvent and irresponsible.[3] But where a wife's fortune was claimed to be a charge upon the fee of the defendant's estate, and the defendant was in arrears for interest, a receiver was refused to the husband, inasmuch as the fee did not appear to be insufficient security.[4]

Section 505. **Of Receivers in Favor of the State.**— Where proceedings are instituted by the state to recover lands claimed to have escheated, and the plaintiff shows a *prima facie* case, a receiver of the rents and profits may be appointed in its favor, it appearing that they would otherwise be lost.[5]

Section 506. **Of Receivers of Crops and Chattels Real.**— A receiver will be appointed over crops where the parties are contesting the title to the land, each claiming to be in possession, and where each is interfering with the other in harvesting crops grown by him, and threatening forcible resistance.[6] Where the terms of a lease are that the tenant should work the land and the landlord receive a portion of the crops raised as rent, the landlord is not entitled to a receiver to manage and take possession of a crop ungathered.[7] But where the contest is over the title to a chattel real, which is in the possession of the defendant, the facts that the defendants are

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[1] Wiles v. Cooper, 9 Beav. 294.

[2] Laudon v. Morris, 6 Sim. 247.

[3] Baggs v. Baggs, 55 Ga. 590; compare as to procedings for alimony, Holmes v. Holmes, 29 N. J. Eq. 9.

[4] Drought v. Percival, 2 Moll. 502.

[5] People v. Norton, 1 Paige, 17.

[6] Hawacek v. Bohman, 51 Wis. 92.

[7] Williams v. Green, 37 Ga. 37.

insolvent and that the ground rent is largely in arrears are not sufficient, of themselves, to warrant the appointment.[1]

Section 507. **Of Receivers in Aid of Bankruptcy Proceedings.** — A receiver will be appointed in aid of proceedings in bankruptcy where the title of property subject to the proceedings is such that the warrant in bankruptcy is not sufficient to insure the collection of rents.[2] And also where the property of the bankrupt is subject to numerous and conflicting claims and liens, the validity of which have not been determined, a receiver will be appointed, at the instance of the assignee, to take charge of the property in order to secure the interests of all the creditors.[3] And a receiver of the rents of property in the ownership and possession of an insolvent debtor, will be appointed, at the instance of an assignee of the debtor, while he is prosecuting a bill to recover the property, former proceedings of the debtor in bankruptcy preventing the assignee from taking possession.[4] And where a deed of trust was executed for the purpose of applying certain property to the payment of debts, and, owing to the large number of claims, a question arose as to which, if any, were entitled to a priority in case the property were insufficient to satisfy all, a receiver was appointed to manage the property until the determination of that question.[5]

Section 508. **Of Receivers as Between Vendor and Vendee.** — A receiver is often necessary in actions arising out of the purchase and sale of real property, where one of the parties to the contract has obtained or remained in possession of the subject matter, and refuses to carry out his part of the contract. The relief in these cases is granted partly because of the vendor's lien, in case there is a valid contract, for the unpaid purchase money, and, if invalid, that of the vendee for the amount of the purchase money already paid. Thus, a receiver has been appointed as against the vendee in an action for specific performance, where it is shown that he is insolvent and is about to convey his property to trustees for the benefit of his creditors,[6] and the appointment, in such a case, may be made as well before as after answer.[7]

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[1] Kipp v. Hanna, 2 Bland. 26. The chattel real in this case was a house standing on leasehold property.

[2] Keenan v. Shannon, 9 Nat. Bank Reg. 441.

[3] McLean v. Lafayette Bank, 3 McLean, 503.

[4] Hollis v. Bryant, 12 Sim. 492.

[5] Hamerlain v. Marble, 24 Miss. 586.

[6] Hall v. Jenkinson, 2 Ves. & Bea. 125. In this case the possession of the property had continued in the vendor.

[7] Metcalf v. Pulvertoft, 1 Ves. & B. 180.

The reason for the appointment, during the pending of an action for specific performance, is all the stronger where the purchaser has been let into possession and refuses to carry out his contract on account of dissatisfaction with the title.[1] And where real estate was sold at auction, under an order of the court by a receiver, and the purchasers declined to complete the sale, the court directing them to do so, and later the receiver consented to relieve them, the court directed the receiver to return the purchase money and also the amount expended for examining the title and opposing the proceeding to compel performance of the contract.[2] And if the purchaser might have demanded possession, pending the suit, and was prepared to account, and, because of his neglect to do so, a receiver is appointed, the fees of the receiver must be paid out of the rents which would have belonged to him.[3] And, if the purchaser is finally obliged to take the title, the receiver is considered his receiver, and the possession his possession.[4]

A receiver was appointed in Tennessee, after a decree in favor of the vendor from which the purchaser appealed, because of the failure of the latter to pay the taxes.[5] But if the relief is prematurely applied for, and an appointment has been made, it should be vacated.[6] Where the purchaser has been let into possession under a title deed, and, owing to his failure to complete the payment of the purchase money, the vendor brings suit and seeks to have the property sold and its proceeds applied thereon, and the purchaser is insolvent and is committing waste, a receiver may be appointed *pendente lite*;[7] and the receivership will cover the rents and profits, if the premises are inadequate security.[8]

The same principle was applied where the vendee had been in possession a number of years, receiving the rent and profits and no part of the purchase money had been paid, the vendee having allowed the premises to run down for want of repairs and having been adjudicated a bankrupt.[9] But a receiver will not be ap-

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[1] Boehm v. Wood, 2 Jac. & W. 236; Free v. Hinde, 6 Madd. 7; Payne v. Atterbury, Harring (Mich.), 414.

[2] Drake v. Goodrich, 6 Blatchf. 581.

[3] Brown v. Dowdall, 2 Hog. 198.

[4] Boehm v. Wood, Turn. & Russ. 332; s. c. 2 Jac. & W. 236.

[5] Darusmont v. Patton, 4 Lea, 597.

[6] Jones v. Boyd, 80 N. C. 258.

[7] McCaslin v. State, 44 Ind. 151. *Contra*, Guernsey v. Powers, 9 Hun, 78; Morford v. Hamner, 8 Baxter (Tenn.), 391.

[8] Phillips v. Eiland, 52 Miss. 721; Smith v. Kelley, 31 Hun, 387. *Contra*, Collins v. Richart, 14 Bush, 621.

[9] Tufts v. Little, 56 Ga. 139. *Cf.* Gunby v. Thompson, Ibid, 316; Chappell v. Boyd, Ibid, 578; Worrill v. Coker, Ibid, 666.

pointed where the amount of the debt is disputed and the vendee is not shown to be insolvent.[1]

The insolvency to warrant a receiver should have been unknown to the vendor at the time of the sale, or should arise subsequent thereto, for if it were known to exist at the time of the sale, in the absence of fraud, no ground for the relief exists.[2] And where, in an action, a judgment was obtained for the recovery of the land upon the payment of a specific sum, a receiver may be appointed on a bill for an accounting of the rents and profits, the defendants being insolvent.[3] But a demurrer to a bill asking for a receiver will be sustained where all the persons directly interested in the subject matter are not made parties to the action.[4]

Section 509. **Of Receivers in Aid of the Vendee.**—The same relief has been accorded to the purchaser, upon a bill for specific performance, where the vendor had fraudulently repossessed himself of the property;[5] so also, where the purchasers claimed title from a husband, and the husband had made a post-nuptial settlement on his wife, upon the ground that the vendee's title would prevail against the settlement.[6] And where the land had been purchased at a sheriff's sale, the period of redemption having expired, and there were growing crops on the land which belonged to the plaintiff, it appearing that the principal parties were insolvent and, it being plain that the whole transaction was a scheme to defraud the plaintiff, a receiver was appointed to take charge of the crops and to harvest and prepare them for the market.[7] And the same relief was granted upon a bill alleging that the debtor had fraudulently conveyed his real property in order to delay or defeat his creditors.[8]

Section 510. **Of Receivers in Cases of Sales of Mines.**—It has already been shown that receivers will be appointed when disputes concerning the management or control of mines arise between the legal owners. The same action will be taken in case of disagreements between purchasers and sellers as to the validity of a contract of sale, or as to the sufficiency of the title. Thus, where a mine was sold under a mortgage and the mortgagor continued in possession, working the mine and refusing to pay the purchaser his inter-

[1] Hughes v. Hatchett, 55 Ala. 631.
[2] Jordon v. Beal, 51 Ga. 602.
[3] Collier v. Sapp, 49 Ga. 93.
[4] Lumsden v. Fraser, 1 Myl. & Cr. 589, affirming s. c. 7 Sim. 555.
[5] Dawson v. Yates, 1 Beav. 301.
[6] Metcalfe v. Pulvertoft, 1 Ves. & Bea. 180.
[7] Corcoran v. Doll, 35 Cal. 476.
[8] Mays v. Rose, Freem. (Miss.) 703.

est, a receiver was appointed on the purchaser's application, it being alleged that the mortgagor was insolvent and that there was danger that the mine would be exhausted.[1] And in another case, where the property was a colliery, and both sides admitted that it must be worked or the lease would be forfeited, and, moreover, that if it were not kept going, it would be drowned out, a receiver was appointed in a suit by the buyer to set aside the purchase on the ground of fraudulent representations.[2] And, again, the receiver was discharged because he had no funds with which to work the mine, thus necessitating a suspension of operations, and it not appearing that there was any danger by reason of the defendants remaining in possession.[3]

Section 511. **Of the Effect of the Appointment Upon the Title.** —As has already appeared in the chapter in which we have considered the question of the receiver's title, it is a general rule that a receiver may be appointed upon either one of two grounds: first, to place the subject matter of the litigation in the hands of a disinterested person, in order to preserve its subject to final decree; and, second, to aid the court in carrying out its decree, when it is necessary to have transfer of the title made, or when the property is to be disposed of in satisfaction of the complainant's lien. In the first instance the receiver generally obtains no title, his right being merely possessory.[4]

Upon similar grounds a sequestrator of real estate, or a receiver of rents and profits, takes no title to the real estate, and as long as there is no interference with his occupancy and control, he has no concern as to the title to the property. Accordingly, a conveyance of the paper title is not inconsistent with, or necessarily adverse to his possession or rights.[5]

But when a receiver is appointed in order to enforce a decree, he usually takes title to the property in controversy, either by a formal conveyance or assignment, or by the filing of the decree in a particular office pursuant to some statute.[6] And where a receiver is appointed for the purpose of settling up the affairs of a dissolved corporation, he is generally invested with the title to the realty.[7] When a

[1] Hill v. Taylor, 22 Cal. 191.

[2] Gibbs v. David, L. R. 20 Eq. 373. In this case the plaintiffs were required to supply the means of carrying on the colliery.

[3] Carter v. Hoke, 64 N. C. 348. *Cf.* Norway v. Rowe, 19 Ves. 144.

[4] Chase's Case, 1 Bland, 206; Montgomery v. Merrill, 18 Mich. 338.

[5] Foster v. Townshend, 68 N. Y. 203; s. c. 2 Abb. N. C. 29.

[6] See, upon this point, Smith v. Tozer, 11 N. Y. Civ. Proc. R. 343.

[7] Owen v. Smith, 31 Barb. 641.

receiver is appointed to take charge of the proceeds of real estate pending a contest over the title, and the plaintiff recovers, it has been held that he is entitled, without further proceedings, to an order directing the receiver to pay over the funds to him.[1]

Where a referee, or master, has been ordered by the court to sell the property, and the title deeds are in the possession of a party beneficially interested, who makes default in bringing them in, a receiver may be appointed to speed the cause.[2]

Section 512. **Of the Practice—Defences.**—Where the emergency is imminent, calling for immediate interference on the part of the court, the order appointing a receiver is sometimes summarily made, before answer, on the bill and affidavits,[3] but, in all cases, the person against whom a receiver is appointed should either be party to the suit or before the court.[4] One who is a stranger to the proceedings, although claiming part of the land covered by the receivership, cannot be heard on a proceeding to make the appointment absolute.[5] The proper course for him to pursue has been considered elsewhere.[6]

It seems that it is a defence to proceedings for the appointment of a receiver of the rents and profits that the defendant consents to pay them into court.[7] It is also a defence that the state of facts upon which the application is made has been acquiesced in by the plaintiff for a number of years, and that no new or additional element of danger is shown.[8] And where the appointment is asked for on the ground that the defendant, a corporation, has so managed its property and its proceeds as to involve a breach of trust, the application will be refused, where there has been long acquiescence on the part of the complainant, with knowledge of the facts. Especially is this the true view where the trustee has no discretion, and the trust is a mere naked trust.[9] Where no additional danger to the property is shown, and it appears that it had been accumulated by the corporation fraudulently, of all which the complainant had been fully informed, and in which he had acquiesced for a long time, the appointment of a receiver of the property was refused.[10]

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[1] Whitney v. Buckman, 26 Cal. 447.

[2] Brigstocke v. Mansel, 3 Madd. 47. *Cf.* Shee v. Harris, 1 Jo. & Lat. 91.

[3] Woodyatt v. Gresley, 8 Sim. 180.

[4] Mays v. Wherry, 3 Tenn. Ch. 34.

[5] Creed v. Moore, 4 Ir. Eq. 684.

[6] See sections 229, 230, *supra*.

[7] Prebble v. Boghurst, 1 Swanst. 309.

[8] Municipal Commissioners of Carrickfergus v. Lockhart, Ir. Rep. 3 Eq. 515.

[9] Skinners Co. v. Irish Society, 1 Myl. & Cr. 162.

[10] Hager v. Stevens, 6 N. J. Eq. 374.

Section 513. **Of the Order of Appointment** — The order appointing a receiver should clearly describe the property over which the receiver is to be appointed, in order that the court may, by injunction or otherwise, aid its receiver, in respect to his title or possession.[1] A court of equity will not ordinarily appoint more than one receiver, or set of receivers, of the same property, owing to the obvious inconvenience of having more than one person entitled to the control of the same property; and where more than one application is made, the original receivership may be extended to any additional property that it may appear proper to include, and, if necessary, the receiver will be required to give additional security, in default of which a new appointment will be made.[2]

And if, by chance, more than one appointment has been made, the court may remove all but one.[3] But this rule will not be applied to the prejudice of any of the parties in interest, as, for example, so as to allow later creditors to stand on an equal footing with the more vigilant, by permitting them to come in, before answer, with the consent of the defendant.[4] The effect of an extension of the powers of a receiver is the same as a new appointment, and rents and income received before the extension will not be applied on the claims of those creditors on whose later application the extension is made.[5] Where a receiver of the rents and profits has been appointed, and subsequently a sale of the premises has been ordered, the receivership will be continued until the sale is closed, and the receiver has the right to collect the rents up to that time.[6] If the defendant is in possession of the property of which a receiver is appointed, an order should be obtained from the court directing him to surrender possession to the receiver, as there is no privity between the defendant and the receiver; and if, on account of the omission to obtain the order, a loss occurs, it must fall upon the party in default.[7] And where, after a receiver has been appointed, a proposition is made for a compromise and division of the property among the various claimants, the receivership will be continued until a final agreement is reached.[8]

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[1] Crow v. Wood, 13 Beav. 271.
[2] Wise v. Ashe, 1 Ir. Eq. 210.
[3] Kelly v. Rutledge, 8 Ir. Eq. 228.
[4] Brown v. Nolan, 10 Ir. Eq. 57.
[5] Agra & Masterman's Bank v. Barry, Ir. Rep. 3 Eq. 443; Lanauze v. Belfast, Holywood & Bangor Ry. Co. Id. 454.
[6] Quin v. Holland, Ridgeway's Cases (*temp.* Hardwicke), 295.
[7] Griffith v. Griffith, 2 Ves. 400.
[8] State v. Allen, 1 Tenn. Ch. 512.

II.

Of the Powers and Duties of Receivers of Real Property.

Section 514. **Of the Time when the Appointment Takes Effect.**—The proper course for a receiver to adopt in order to make his appointment effective as against tenants in possession of premises over which he has control, is to serve a copy of the order or notice, according to the local practice, upon them. From the time of such service the tenants must pay the rents to him, and in the event of his death, it is their duty to retain the rents until a new appointment.[1]

Until such service has been made the receiver can maintain no action against the tenants for the rent. The object of this notice is the same as in the case of an assignment, that is, to prevent a payment by the tenant to a wrong person in ignorance of the appointment.[2] It follows, therefore, that those persons formerly entitled to collect the rents have no power or authority to interfere with the receiver in respect of the rents and profits, after the order is made absolute.[3] Under the Irish practice, the receiver is entitled to collect any and all arrears of rent due at the time of the order of reference for his appointment.[4] And, under the same practice, a trustee, who has had the management of the estate, ceases to be responsible for arrearages at the date of the appointment, in as much as all his power is taken away and vested in the receiver.[5]

In New Jersey, where a statute authorizes the appointment of receivers of insolvent corporations, and the appointment operates as a conveyance of the corporate property, it has been held that the rent accruing between the appointment and sale, belongs to the receiver for the benefit of creditors, and that that accruing after the sale goes to the purchaser.[6]

Section 515. **Of the Receiver's Duty and Control of Rents.**—The principal duty of a receiver of real property is to look after

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[1] Russell v. Baker, 1 Hog. 180; Hollier v. Hedges, 2 Ir. Ch. (N. S.) 370.

[2] Hunt v. Wolfe, 2 Daly (N. Y.) 298.

[3] McLoughlin v. Longan, 4 Ir. Eq. 325.

[4] McDonnell v. White, 11 H. of L. Rep. 570. *Cf.* Harrison v. Fitzgerald, Ir. Rep. 10 Eq. 394. As to apportionment of rents see Beechey Smyth, 11 L. R. (Ir.) 88.

[5] McDonnell v. White, 11 H. of L. Rep. 570.

[6] Corrigan v. Trenton Delaware Falls Co. 7 N. J. Eq. 489; Fish v. Potts, 8 Id. 277, 909.

the rents of the estate; he is virtually made landlord and has the rights of a landlord as against the tenants.[1] In order properly to protect the tenant, the English courts were accustomed to direct the tenants to attorn to the receiver, and upon their refusal to do so, a motion might be made requiring them to show cause why the possession should not be delivered to the receiver, and, on the determination of the motion, a proper order would be made.[2] If, on such motion, the tenants should show that an action was pending against them to recover the rent, and that the effect of granting the motion would be to compel them to pay the rent twice, the motion might be ordered to stand over until the determination of the action, when a proper order could be entered.[3] If, after having attorned, the tenant refuses to pay the rent to the receiver, the court will compel him to do so.[4] When the receiver of the rents and profits is authorized by the court to permit the defendant to collect the rents until further direction, upon giving a satisfactory bond, the order does not affect the rights of the parties, the fund will still be under the control of the court, and the defendant will be the receiver's agent.[5] And if the tenants pay rent due the receiver to a third person, who has no authority to collect it, it will be considered as paid to him for the receiver, and a party entitled thereto, under a prior appointment, will not lose his rights, even though the receivership has been extended in behalf of others.[6]

It has been held that a receiver of the rents of real property should not allow them, when collected, to lie idle, but should make an application for leave to invest the moneys for the benefit of the parties interested.[7]

Ordinarily the receiver appointed pending the action, particularly as to the real estate, should simply be directed by the court to take care of and let the property in proper cases, collect the rents and debts and hold funds coming into his hands subject to the order of the court, from time to time, and until the action is determined. But there are cases in which it is expedient and very proper to direct a sale of the property both real and personal. The court should always be careful, however, that a proper case is presented in the exercise of such power, and to see particularly that the owner of such property cannot be unduly prejudiced by the sale

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[1] Commissioners v. Harrington, 11 L. R. (Ir.) 127.

[2] Reid v. Middleton, Turn. & R. 455.

[3] Hobhouse v. Hollcombe, 2 De G. & S. 208.

[4] Hobson v. Sherwood, 19 Beav. 575.

[5] Garr v. Hill, 5 N. J. Eq. 639.

[6] O'Callaghan v. O'Callaghan, 3 Ir. Ch. (N. S.) 376.

[7] Foster v. Foster, 2 Bro. C. C. 616.

thereof. It should have in view the rights and advantages of all the parties, as nearly as may be.[1]

Section 516. **Of the Receiver's Right to Distrain.**—It is within the proper scope of this work to discuss here only the rules by which the right of distress may be exercised, as, for example, whether it is necessary for the receiver first to obtain leave of the court, as in the case of bringing suits. No reference will be made to the statutes limiting, or abolishing, the right.

As to the necessity of applying to the court for leave there formerly seems to have been some question, but it is now a generally received rule that that step is unnecessary, on account of the opportunity it allows the tenant to make away with his goods.[2] Some, however, limit this right, and deny the right of the receiver to distrain, if the rents are in arrears for more than one year, without first obtaining leave.[3] But where permission has been given, it is not to be considered as limited to any particular act or time.[4] And where there is doubt in reference to the legal title, it is the better practice first to obtain leave.[5]

The leave will be refused where it appears that the plaintiff is proceeding at law to collect the rent, the receiver offering no resistance, until the plaintiff undertakes to prosecute his action no further.[6] And it will also be refused where the receiver has obtained an order of attachment in contempt proceedings against the tenant because of the non-payment.[7] But the fact that an order to distrain is outstanding will not interfere with the granting of leave to commence an ejectment suit.[8]

Section 517. **Of the Enforcement of the Receiver's Rights—Collecting Rent.**—The receiver, being a ministerial officer of the court, may always apply to it for assistance or instruction when necessary; consequently, the receiver, in these cases, has greater powers than the landlord whom he supersedes. The refusal, or neglect, of a tenant to pay the rent to the receiver is such a contempt that, if the tenant has been properly apprised of the appointment, an attachment may issue to compel payment;[9] but, in such

[1] Forsaith Machine Co. v. Hope Mills Lumber Co. 109 N. C. 576.

[2] Pitt v. Snowden, 3 Atk. 750; Raincock v. Simpson, cited in a note to Shelley v. Pelham, Dick. 120.

[3] Brandon v. Brandon, 5 Madd. 473.

[4] Anon. 1 Hog. 335.

[5] Pitt v. Snowden, *supra*.

[6] Mills v. Fry, 19 Ves. 277; s. c. Coop. 107.

[7] Nugent v. Nugent, 1 Hog. 169.

[8] Sturgeon v. Douglas, 1 Hog. 400.

[9] Armstrong v. Southwell, 1 Ir. Eq. 82.

a case, proof should be given that he has been properly notified of the duty to pay to the receiver,[1] and it has been held, further, if the tenant has recognized the authority of the receiver by paying rent, that it is not necessary thereafter for the receiver to make a personal demand in order to have the warrant issue.[2] But if the receiver has commenced to collect the rent by distraint, the order must be discharged before the attachment warrant will be allowed.[3] An attachment may issue against any party to the action who interferes with the receiver in the collection of the rents.[4] And if the lease, under which the tenant holds, contain a covenant against the premises being used for certain purposes, the receiver is entitled to an injunction against the tenant if he attempt to use the premises in the prohibited manner.[5]

According to the Irish practice, where waste is committed upon property under the control of the receiver, the proper proceeding is for the receiver to apply for a reference to determine what course ought to be taken; but if the necessity be urgent he may apply directly for an injunction, and, at the same time, for a reference.[6] And where a bill for an injunction is filed, and the tenant is solvent, there ought to be a prayer for an accounting and a subpœna to answer, so as to throw the expense of the proceeding upon the party in fault.[7] In another case a conditional order of injunction was granted, upon the receiver's motion, without a bill filed, leaving the case to be determined upon the return of the order to show cause.[8]

It has already been shown that an action to punish for contempt is an entirely independent proceeding, and that a contempt may be committed without reference to the title of the property, so that a proceeding to punish for a contempt does not, in general, affect the title of the person against whom the proceedings are taken. Hence, in a proceeding to punish a tenant for contempt in not paying the rent to the receiver, the court will not go into the question of the right of the party who collects the rent.[9] But it has been held that where a tenant disputes his liability to pay the rent to the receiver on account of a change in the title, the receiver should not apply for an attachment, although he has collected the rent for a number of

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[1] Pope v. Pope, 2 Hog. 335.
[2] Brown v. O'Connor, 2 Hog. 77.
[3] Eyre v. Eyre, 1 Hog. 252.
[4] Thomas v. Thomas, Flan. & K. 621.
[5] Mason v. Mason, Flan. & K. 429.
[6] Mangle v. Lord Fingall, 1 Hog. 142; Dorman v. Dorman, 3 Ir. Eq. 385.
[7] Cooke v. Cooke, 1 Hog 182.
[8] Cronin v. McCarthy, 1 Flan. & K. 49.
[9] Nason v. Blennerhassett, 1 Hog. 402.

years, but should bring an action at law to try the title.[1] And an attachment will not issue against a party for the non-payment of rent where the suit has abated on account of the death of a sole plaintiff.[2] Nor will an attachment issue against the tenant for a like cause, where the receiver has collected the rent from his assignee; the only course is to bring an action at law.[3]

Section 518. **Of Receivers of Leasehold Property.**— Where the property of which a receiver is appointed consists of a leasehold interest, the receiver should make it his first duty to see that the rent thereof is paid. He should not wait for the landlord to take any proceeding to collect, but he may pay it absolutely and without first obtaining leave of the court.[4] In the event of his failure to do so, he may be required to do it by a petition in the cause in which he was appointed; and also, upon a like petition, he may be required to make good any loss to the lessor arising from the failure of the tenant to keep covenants or agreements to maintain the premises in as good condition as he received them.[5]

Section 519. **Of the Duty to Make Repairs and to Lease.**— It has been held that a receiver has the right to make repairs on the premises under his control, out of the moneys in his hands, prior to leasing the same, and that it is not necessary for him to apply to the court for leave before doing so, but that such disbursements will be allowed on his accounting, provided they are reasonable and proper.[6] It has, however, been held in New York, that a receiver of the rents and profits in a mortgage foreclosure, has no power, without the order of the court, to lessen the fund in his hands by expenditures for repairs, but it seems that the court might direct this to be done where necessary for the preservation of the property.[7] Receivers often make application for leave to lease the premises, and in such cases they should set forth the state of the property, and if leased, the name of the tenant, so that his right may not be endangered.[8] The receivers are not allowed, however, to make such a lease as will bind infant remaindermen.[9]

Where a receiver was appointed to wind up a corporation engaged

[1] Pread v. Lewis, 2 Moll. 369.

[2] Brennan v. Kenny, 2 Ir. Ch. (N. S.) 579.

[3] Cane v. Bloomfield, 1 Hog. 345.

[4] Balfe v. Blake, 1 Ir. Ch. (N. S.) 365; Walsh v. Walsh, 1 Ir. Eq. 209.

[5] Neate v. Pink, 3 Mac. & G. 476, affirming S. C. 15 Sim. 450. *Cf.* Brocklebank v. East London Railway Co. L. R. 12 Ch. Div. 839.

[6] Macartney v. Walsh, Hayes, 29 (note b).

[7] Wyckoff v. Scofield, 103 N. Y. 630; affirming S. C. 21 J. & S. 237.

[8] Sealy v. Munns, 1 Ir. Eq. 332.

[9] Gibbins v. Howell, 3 Madd. 479.

in the manufacture and supply of gas, he was directed, by the order appointing him, to keep the works in operation, to make necessary repairs, and to pay and discharge the debts of employes, and bills for supplies and operating materials contracted within sixty days prior to his appointment. Pursuant to the orders of the court, he made improvements and extensions on the gas works of the company, part of which expense was paid by money raised on receivers' certificates, and part out of the earnings of the company. Default having been made in the payment of interest on the bonds, secured by a mortgage given prior to his appointment, and the property having been sold under a decree of foreclosure, and the proceeds paid into court for distribution, it was held that meters supplied to the company were not operating or supply materials, but rather that they were of the nature of materials used in the construction of the works, and, having been supplied more than sixty days prior to the appointment of the receiver, the creditors supplying them were not entitled to be paid out of the fund in court, in preference to the bondholders.[1]

Section 520. **Of Sales by a Receiver.** — The court will entertain a bill by its receiver for leave to sell real property under his control, when proceedings are instituted in another court to enforce a lien upon it. In such a case the property will be sold free from all liens, and the proceeds will be applied to their payment.[2] But where the receiver is appointed in an action to rescind the contract, an order of sale for the benefit of the plaintiff, before the final hearing, is improper.[3]

The duty of a purchaser from a receiver has been set out by Mr. Justice Field, as follows: "A purchaser is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that it is a suit in equity, or was one, in which the court appointed a receiver of the property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest sold."[4] And where the rights of the creditors of a deceased person were determined, upon a bill filed by them against his administrator, and the administrator was removed and a receiver appointed to settle the estate, a deed from the receiver, pursuant to an order of the court authorizing a sale, was held to convey a good

[1] Reyburn v. Consumers' Gas, Fuel & Light Co. 29 Fed. Rep. 561 (1887).

[2] De Visser v. Blackstone, 6 Blatchf. 235.

[3] Esterlund v. Dye, 56 Ga. 284.

[4] Koontz v. Northern Bank, 16 Wall. 196.

title.[1] So, also, it has been held that the purchaser from a receiver, who has obtained possession of the property, cannot, in an action against him to enforce the lien for the unpaid purchase money, question the validity of the appointment of the receiver, except in case of fraud or mistake.[2]

Section 521. **Of the Termination of the Receivership.** — The functions of a receiver are usually at an end upon the termination of the litigation in which he is appointed, and although he is accountable to the court at all times until he surrenders his trust and is formally discharged, yet his general functions and powers, including the custody and management of the property, terminate with the final decree, unless and only so far as it may provide some act or duty to be performed by him, concerning the disposition of the property, other than the mere surrender of it to the party thereby entitled to receive it. So where it was determined, in a suit in the supreme court of Oregon, that certain conveyances from the plaintiff to the defendant were, in fact, only mortgages, that the defendant was only the mortgagee and that the plaintiff was entitled to redeem the property upon the payment of a certain sum of money to the defendant within ninety days, the possession of the property meanwhile to be retained by the receiver, who had been appointed in the suit, and subsequently the circuit court to which the mandate of the supreme court was sent, upon the application and consent of the parties, made an order enlarging the time for redemption, and placing the property in the hands of two persons as receivers during that time, it was held, in the United States court, upon an application for an order of sale for a certain part of the property, provided for in a decree of that court, that the previous decree of the supreme court was a determination of the whole controversy in the former suit, and that, at the end of the ninety days, whether the redemption was made or not, the receiver's functions were at an end, and that the two persons subsequently appointed receivers were not receivers, but only agents of the parties, and that their appointment would not prevent the United States court from directing the sale of the property on which the plaintiff therein had a lien by virtue of a decree before given in the case.[3]

And where the receiver's functions are terminated, the real property is subject to the lien of a judgment and the levy of execution, if no assignment has been made.[4]

[1] Walker v. Morris, 14 Ga. 323.
[2] Stelzer v. La Rose, 79 Ind. 435.
[3] Hickox v. Holladay, 29 Fed. Rep. 226, 234 (1886).
[4] Montgomery v. Merrill, 18 Mich. 338.

CHAPTER XVI.

RECEIVERS OF MORTGAGED PROPERTY.

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I.

As Between Mortgagor and Mortgagee.

Section 522. **Introductory.**— It is well established that a receiver in a proper case, may be appointed in aid of a mortgagee as against a mortgagor. There is, in general, nothing in the nature of the mortgage contract, which can operate to deprive a mortgagee of such relief, if he establish facts which are sufficient to move a court of chancery to act in his behalf. The grounds upon which such a receiver will be appointed are not, however, clearly defined; although the right to the relief is, in general, conceded, the grounds upon which the court will act are not entirely settled, and the decisions in point are conflicting.

A mortgage is, in some jurisdictions, held to be a conditional sale, vesting the title in the mortgagee upon the non-fulfillment of the condition. Another theory is that it merely creates a lien on the property, to secure the payment of a debt, to be enforced by foreclosure. Some courts incline to take a middle ground not wholly endorsing either of these positions. The question has been further complicated by legislative enactments, regulating the appointment of a receiver, thus raising the question whether such statutes are to be held to have abrogated the original jurisdiction of courts of equity. Still other difficulties arise out of covenants and agreements between the parties affecting the appointment, involving intricate questions of construction. The rights and interests of third parties must sometimes be taken into account, and the method in which the application is to be made to the court, whether on motion, or by original bill, or by a prayer in the original bill, will sometimes perplex even experienced counsel. Besides all this, a court of equity, according to its fundamental rule, will not grant such relief when it appears that the plaintiff has a full and adequate remedy at law.

Section 523. **The General Rule.** — In general it may be said to be the rule in these cases that a receiver will be appointed whenever it appears that the mortgagor is making such use of the premises as to impair the security, and at the same time, that a court

of law does not afford full and adequate relief. So, also, when the security is inadequate because the property has become insufficient in value or amount to satisfy the mortgage debt, and especially when the debtor is otherwise irresponsible. Upon the motion for a receiver in such a case it is, as usual, necessary to establish the facts, by affidavits or otherwise, to the satisfaction of the court, before the relief will be granted.[1] The inadequacy of the security must be limited to the debt of the mortgagee making the application.[2] And where the amount due is undetermined and uncertain, and the allegations of inadequacy are denied, the relief will be refused.[3]

A mere default in payment of the debt constitutes no ground for the exercise of this jurisdiction,[4] unless there is a stipulation to that effect in the mortgage.[5] It is generally held that statutes regulating the appointment of receivers in these cases are a mere enlargement of the original jurisdiction of the court of chancery,[6] but where the statute gives a court of law power to appoint a receiver, the jurisdiction of the court of chancery is not thereby limited or restrained, but the remedy is co-ordinate and may still be sought in equity.[7] Where the statute authorizes the appointment of a receiver in certain cases in aid of a foreclosure, it may be made where the original mortgagor has died and his administrator is a party.[8] And where a wife joined in the mortgage and her dower interest has been subsequently set-off, according to a statutory provision, a receiver may be appointed, although her interest is inchoate, upon her own application, where the remainder of the premises is insufficient and the mortgagor is insolvent.[9]

A receiver may be appointed pending a suit for specific performance, where the mortgagor has received the money in advance, but has failed to carry out the agreement by the execution of a mortgage.[10]

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[1] Astor v. Turner, 2 Barb. 444; Morrison v. Buckner, Hemp. 422; Hackett v. Snow, 10 Ir. Eq. 220; Pullan v. Cincinnati & Chicago R. R. Co. 4 Biss. 35; Cheever v. Rutland, etc., R. R. Co. 39 Vt. 653.

[2] Warner v. Gouverneur's Executors, 1 Barb 36.

[3] Callanan v. Shaw, 19 Iowa, 183.

[4] Williams v. Robinson, 16 Conn. 517.

[5] Whitehead v. Wooten, 43 Miss. 523; Morrison v. Buckner, *supra*.

[6] Bank of Ogdensburg v. Arnold, 5 Paige, 38; Adair v. Wright, 15 Iowa, 385.

[7] Tripp v. Chard, Railway Co. 21 Eng. L. & Eq. 53. See further as to local statutes, Hursh v. Hursh, 99 Ind. 500; Douglas v. Cline, 12 Bush. (Ky.) 608; Woolley v. Holt, 14 Id. 786; Northwestern Mutual Life Ins. Co. v. Park Hotel Co. 37 Wis. 125.

[8] Jacobs v. Gibson, 9 Neb. 380.

[9] Main v. Ginthert, 92 Ind. 180.

[10] Shakel v. Duke of Marlborough, 4 Madd. 468.

Section 524. **Of Inadequacy of Security.**—As has already been stated, the principal ground for the appointment of a receiver is inadequacy of security. This inadequacy may be either, first, the insufficiency of the mortgaged premises as a security for the mortgaged debt, or, second, the irresponsibility or inability of the mortgagor, or other person liable for the debt, to pay any deficiency.[1] What will constitute irresponsibility on the part of the mortgagor, has been clearly stated by the supreme court of Michigan,[2] as follows: "That the mortgagor, or other party to the suit who is personally liable for its payment, is insolvent, or out of the jurisdiction of the court, so that an execution against him for the balance that should remain due after the sale of the mortgaged premises, would be unavailing."

The power to make the appointment in these cases, as in others, is discretionary.[3] But this discretion is not to be the exercise of the mere personal judgment of the individual chancellor to whom the application is made, but it is to be exercised in conformity to the general principles of equity jurisprudence. The petitioner should, therefore, state clearly the facts upon which the application is made, and also give proof of the same; if this is not done the relief will be denied,[4] and the burden of proof is always on the petitioner.[5] Proof must also be given of the insufficiency of the security, and this insufficiency must relate to the value of the property as compared with the principal debt on which the application is made, without reference to subsequent mortgages. Thus where the petition stated that the premises were not an adequate security for "all just incumbrances" on them, in virtue of subsequent in-

[1] Warner v. Gouverneur's Executors, 1 Barb, 36; Shotwell v. Smith, 3 Edw. Ch. 588; Whitehead v. Wooten, 43 Miss. 523; Sea Insurance Co. v. Stebbins, 8 Paige, 565; Quincy v. Cheeseman, 4 Sandf. Ch. 405; Douglas v. Cline, 12 Bush. (Ky.) 608; Newport, etc., Bridge Co. v. Douglas, Id. 673; Hyman v. Kelly, 1 Nev. 179; Brown v. Chase, Walker (Mich.), 43; Hill v. Robertson, 24 Miss. 368; Phillips v. Filand, 52 Miss. 721; Price v. Dowdy, 34 Ark. 285; Commercial & Savings bank v. Corbett, 5 Sawyer, 172; Finch v. Houghton, 19 Wis. 150; Henshaw v. Wells, 9 Humph. (Tenn.) 568; Kerchner v. Fairley, 80 N. C. 24; *In re* Tallahassee Manufacturing Co. 64 Ala. 567; Woolley v. Holt, 14 Bush, (Ky.) 788; Myers v. Estell, 48 Miss. 372, 403; United States Trust Co. v. New York, West Shore & Buffalo R. R. Co. 101 N. Y. 478; s. c. 2 Cent. Rep, 402.

[2] Brown v. Chase, *supra.*

[3] Cone v. Paute, 12 Heisk. (Tenn.) 506; Jacobs v. Gibson, 9 Neb. 380.

[4] Morrison v. Buckner, Hemp. 442; Callanan v. Shaw, 19 Iowa, 183; Hackett v. Snow, 10 Ir. Eq. 220; First National Bank of Sioux City v. Gage, 79 Ill. 207; Brown v. Chase, Walker (Mich.), 43; Pullan v. Cincinnati, etc., R. R. Co. 4 Biss. 35; Shotwell v. Smith, 3 Edw. Ch. 588; Sea Ins. Co. v. Stebbins, 8 Paige, 565.

[5] Burlingame v. Parce, 12 Hun, 144.

cumbrances, the mortgagor, however, averring that the property was a sufficient security for the debt upon which the application was founded, it was held that there was no ground for the appointment.[1] And where the lower court is of the opinion that a receiver is necessary on the ground of inadequacy, an appellate court will not disturb its decision.[2]

Section 525. **The English Rule as to Inadequacy of Security.** — A somewhat different rule prevails in England and a number of the states of the Union, where the common law theory of mortgages prevails. Under this interpretation of the mortgage contract, the mortgage is regarded in fact, as it is in form, a conveyance. As soon as the mortgage debt is past due and unpaid, the mortgagee acquires the legal estate, and he may immediately enter into possession, or bring an ejectment suit to obtain possession. Hence whenever the mortgagee commences proceedings to acquire the possession, he has an adequate remedy at law, and equity will not interfere.[3] Upon this theory all mortgages subsequent to the first are equitable mortgages, and a receiver is often appointed in aid of the owners of such securities.[4]

Again, the court will interfere in aid of a first mortgage where there is some equitable reason for so doing other than and in addition to mere inadequacy. Thus, where the mortgagor forcibly prevented the mortgagee from taking possession when he had a legal right to do so, a receiver was allowed;[5] and, also, where the mortgage about to be foreclosed was shown to have been given by one as surety to secure the payment of the principal debt, there being a provision in the mortgage that the mortgagee should not have recourse to the surety's estate, or be at liberty to sell it, until the estate primarily charged should prove an insufficient security.[6] And where the mortgaged property is occupied by numerous tenants and the rents are difficult to collect, a receiver will be appointed.[7]

Section 526. **The Rule in New Jersey as to Inadequacy of Security.**—The common law rule prevails in a number of the states,

[1] Warner v. Gouverneur's Executor's, 1 Barb. 36. The rule in the case of earlier encumbrancers will be considered later.

[2] Ponder v. Tate. 86 Ind. 330.

[3] Berney v. Sewell, 1 Jac. & W. 647; Ackland v. Gravener, 31 Beav. 482; Sturch v. Young, 5 Id. 557.

[4] Meaden v. Sealey, 6 Hare, 620; and the cases cited in the preceding note. The case of junior mortgages is elsewhere considered.

[5] Truman v. Redgrave, L. R. 18 Ch. D. 547.

[6] Ackland v. Gravenor, *supra*.

[7] Sturch v. Young, *supra*.

as in New Jersey and Mississippi. In a few others the same rule results from the interpretation of a local statute. In New Jersey and the other states that adhere strictly to the common-law rule, mere inadequacy is not a sufficient ground for the appointment of a receiver;[1] there must be some additional reason for the appointment, as, for example, something which impairs the security or hinders the enforcement of the legal remedy, or the fact that the mortgagor's estate is merely equitable.[2] Thus, where the grantee of the mortgagor was let into possession under an agreement with the mortgagee, which upon obtaining possession, he refused to carry out, it appearing that he was preparing to reap the crops for his personal benefit, the court held his bad faith, in connection with the insufficiency of the security and the insolvency of the mortgagor, sufficient ground for appointing a receiver.[3] And where the mortgagor had committed waste and threatened further waste, and had yielded possession to one without reserving the rent, a receiver was allowed.[4] And, also, where the mortgagor, being in possession, had allowed the interest to fall into arrears and the taxes to remain unpaid, and the premises were insufficient security, the mortgagee having no personal security, a receiver was appointed.[5] The fact that the assignees in insolvency had sold the mortgagor's interest, and that the purchaser had voluntarily conveyed the property to the mortgagor's wife, does not present a case for a receiver.[6]

Section 527. **The Rule in Mississippi as to Inadequacy of Security.**—The rule in Mississippi is set out by the supreme court, in Hill v. Robertson,[7] as follows: "Independent, however, of the plain case made by the pleadings and proofs, the complainant may rest his claim to a receiver upon another ground; upon the maturing of the debt and a failure to pay, the legal title becomes absolute in the complainant. The legal title draws to it the right of possession, which, if enjoyed, would give the income of the property to the mortgagee, to keep down the annual interest, and the sur-

[1] Oliver v. Decatur, 4 Cranch C. C. 458; Williamson v. New Albany R. R. Co. 1 Biss. 201; Union Trust Co. v. St. Louis, Iron Mountain & Southern R. R. Co. 4 Dill. 114; Best v. Schermier, 6 N. J. Eq. 154; Frisbie v. Bateman, 24 Id. 28.

[2] Warwick v. Hammell, 32 N. J. Ev. 427; Cone v. Paute, 12 Heisk. (Tenn.) 506; Johnson v. Tucker, 2 Tenn. Ch. 398; Frisbie v. Bateman, 24 N. J. E. 28. *Contra*, Weiss v. Neil, 14 S. W. R. 1097.

[3] Cortelyeu v. Hathaway, 11 N. J. Eq. 39.

[4] Brasted v. Sutton, 30 N. J. Eq. 462.

[5] Mahon v. Crothers, 28 N. J. Eq. 567; Chetwood v. Coffin, 30 Id. 450.

[6] Frisbie v. Bateman, 24 N. J. Eq. 28.

[7] 24 Miss. 368 (1852.)

plus, if any, to apply to the principal. The chancellor, in appointing the receiver, merely conferred upon him those rights and powers which a court of law at the same time would have conferred upon the complainant, whose title was sufficient to give him the possession, and consequently the use of the property. But equity, looking to the original design of the parties, in creating the mortgage only a security for a debt, will permit neither to enjoy a legal right to the prejudice of the other, and will adopt that course of proceeding which will attain the proper end. This end is the payment of whatever is justly due of principal and interest to the creditor. The property must be managed so as to accomplish this end. * * * Upon this failure to pay the legal title vests in the mortgagee, as an incident to which is the right of possession, which is necessary to be enjoyed either by the mortgagee himself, or managed for his benefit by the court, to meet the debt which the law creates in the shape of interest, and which we must suppose was not provided for in the mortgage, because it could only accrue by a breach of contract on the part of the debtor, in failing to pay at the time stipulated; and the law, presuming that every man intends to perform in good faith his contracts, would not presume that the mortgage was more than a sufficient security for the principal and interest to the maturity of the debt."

This seems to carry the principle very far. In a later case,[1] however, the court refused to appoint a receiver upon the ground that " unless the mortgagee has contracted that he shall have the rents and income after default made, he is not entitled to them, or to a receiver to get them in, except in case of the insufficiency of the property to meet the debt."

Section 528. **The Irish Rule as to Inadequacy of Security.**— The rule of the Irish court of chancery, upon the appointment of receivers in these cases, is stated as follows, by the master of rolls, in Herbert v. Greene:[2] " According to the general course and practice of this court, in a foreclosure suit, or a suit to raise a charge affecting lands by sale of the lands, an order is not made for the appointment of a receiver, unless under the following circumstances: First, where interest is due on the security, the court usually requiring an affidavit that one year at least is due; or, secondly, where the property is in danger; for example, if the lands are held under a lease and a head rent has been permitted to remain unpaid and in arrears; thirdly, where there is reason to apprehend that the

[1] Whitehead v. Wooten, 43 Miss 523. [2] 3 Ir. Ch. (N. S.) 270, 274 (1854).

sum for which the lands shall be sold will be insufficient to pay the incumbrances or charges thereon."

Section 529. **Of the Effect of the Statutory Abolition of the Remedy by Ejectment.**—Statutes have been passed in many states modifying the interpretation which the courts at common law have put upon the contract between mortgagor and mortgagee, and in many instances taking away the common law remedies of entry and ejectment, upon default in payment of the principal indebtedness — in effect changing the nature of the mortgage from a conditional sale to a lien, and remitting the mortgagor to the equitable remedy of foreclosure. The courts have not always agreed in construing these statutes. In New York, Nevada and elsewhere, the courts hold that the statutes do not affect the power of the court to appoint a receiver, and even in some instances, it seems to be held that there is by reason of the statutory modification of the early rule, a stronger reason for the appointment *pendente lite*, inasmuch as the mortgagee is remitted to a proceeding which is protracted and contingent.[1] This is especially the case where rents and profits of the mortgaged premises are pledged to keep down the interest, but are being diverted.[2]

In California and Iowa a contrary rule prevails. There the courts hold that the property is a mere security for the debt, and that the estate must remain in the mortgagor until his interest is cut off by a sale under foreclosure.[3] In Iowa the rule is the same, even where it is averred that the mortgagor has fraudulently disposed of property covered by the mortgage lien.[4]

Section 530. **Generally of the Causes for the Appointment of a Receiver — Chattel and Real Estate Mortgages.** — Where the mortgagor has allowed the taxes on the mortgaged property to remain unpaid, and in consequence of which the property has been sold for taxes, and it is shown that the insurance on the buildings has been neglected, it has been held that there were strong grounds for the appointment of a receiver in order to save the property.[5]

[1] Hollenbeck v. Donnell, 94 N. Y. 342; Chadbourn v. Henderson, 58 Tenn. 460; Pasco v. Gamble, 15 Fla. 562.

[2] Hyman v. Kelly, 1 Nev. 179.

[3] Guy v. Ide, 6 Cal. 99. *Cf.* Wager v. Stone, 36 Mich. 364; Hazeltine v. Granger, 44 Id. 508; Beecher v. Marquette, etc. Mill Co. 40 Id. 307.

[4] White v. Griggs, 54 Iowa, 650. *Cf.* Barrett v. Nelson, Ib. 41; Myton v. Davenport, 51 Id. 583.

[5] Wall Street Fire Insurance Co. v. Loud, 20 How. Pr. 95; Stockman v. Wallis, 30 N. J. Eq. 449; Chetwood v. Coffin, 30 Id. 450; Finch v. Houghton, 19 Wis. 149; Schreiber v. Cary, 48 Id. 208.

So, likewise, where the mortgagor has covenanted to pay the taxes and to keep the premises insured, and, having failed to do so, the mortgagee has paid them.[1] And a contest between mortgagor and mortgagee as to what property, as far as value is concerned, is covered by the mortgage, presents a case for the exercise of the power.[2]

In like manner bad faith, or fraud, on the part of the mortgagor, or his grantee, as where the latter was put in possession under an agreement to reduce the mortgage one-fourth, and then refused and offered to sell the property for the amount of the incumbrance, after he had reaped the crops, will warrant an appointment.[3]

A statutory provision that "a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure," does not affect the power of the court to appoint a receiver of such property in an action to foreclose the mortgage, when it becomes necessary for the protection of the equitable rights of the mortgagee.[4] The appointment of a receiver is not based upon the ground that the legal title has passed from the mortgagor to the mortgagee, but upon the equitable right of the mortgagee to have his security preserved so that it shall be adequate for the satisfaction of the mortgage debt. The jurisdiction of equity in the appointment of receivers, is not to be deemed to have been taken away by such statute, unless that is its necessary effect or its ultimate purpose.[5] Here the appointment of a receiver was sustained where the hotel, the mortgaged property, had been closed, and there was danger of cancellation of insurance policies and depreciation of the value of the estate.

That a railroad is heavily mortgaged, has made default in the payment of interest; that its business is decreasing, with the probability of further decrease, because of competition; that it is in need of repairs and improvements; that the bondholders are not in harmony; that a foreclosure is about to be decreed and no other way exists for apportioning the rents and profits of the road to its

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[1] Eslava v. Crampton, 61 Ala. 507.

[2] Wall Street Fire Insurance Co. v. Loud, *supra*. In this case the contest was over the machinery on the mortgaged premises, but this was not the only ground for the appointment, as is shown by a preceding statement.

[3] Cortleyeu v. Hathaway, 11 N. J. Eq. 43. This was in addition to the insolvency of the mortgagor and the inadequacy of the security, which, in New Jersey, do not constitute a ground for the appointment.

[4] Hardin v. Hardin, 34 S. C. 77.

[5] Lowell v. Doe, 44 Minn. 144.

directors, are sufficient reasons to justify the appointment of a receiver.[1]

The right to foreclose a mortgage does not carry with it the right to a receiver.[2] There must be something more than the mere maturity of the debt or interest. "It is difficult," said Brewer, C. J., "to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interest of the various bondholders require possession by the court, before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance."[3]

It was asserted in an English case that a mortgagee in possession has no right to the appointment of a receiver; but under the judicature act which gives the right to the appointment of a receiver in all cases where it appears to the court to be just or convenient such a receiver may be appointed.[4]

Insufficiency of the mortgaged property to pay the debt, and danger of its removal beyond the jurisdiction of the court, are sufficient reasons for the appointment of a receiver.[5]

Where a railroad company which was indebted to the State of Maryland by reason of grants to it, was applying its revenues to the payment of junior encumbrances instead of paying the annuity to the state, it was held proper to direct an injunction and an appointment of a receiver of the mortgaged property.[6]

Where rents and profits of real estate in dispute are in imminent danger of being wasted a receiver may be appointed during the controversy.[7] A receiver will be appointed at the instance of parties beneficially interested, where there is any fraud or spoliation, if it be satisfactorily shown that there is danger to the estate or funds unless such a step is taken. If the fund is in danger, if immediate possession should not be taken by the court, which must be clearly proved, a receiver should be appointed; and in such cases it is not against public policy to appoint a receiver over the property of corporations.[8]

The provision in a mortgage that the mortgagee might take pos-

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[1] Mercantile Trust Co. v. Missouri, Kansas & Texas Railway Co. 36 Fed. R. 221

[2] Id.

[3] Id.

[4] In re Prytherch, 42 Ch. D. 590.

[5] Reynolds v. Quick, 128 Ind. 316.

[6] State v. Northern Central Railway Co. 18 Md. 193.

[7] Id.

[8] Id.

session of the property and rent or cultivate it, was held not sufficient to warrant the appointment of a receiver, during the period of redemption, as against a lessee in possession under a lease covering such time and for which the rent has been paid.[1]

A mortgagor who has sold and conveyed the premises mortgaged is not in position to oppose the appointment of a receiver for the protection of the property to other creditors.[2]

That taxes on mortgaged property are suffered to be unpaid; that there has been a sale for back taxes; that insurance on the buildings is neglected and the liability of the machinery to the operation of the mortgage is contested, and the insolvency of the mortgagor, present strong grounds for the appointment of a receiver.[3]

It has been held that if the mortgage security is ample, equity will not appoint a receiver, and take possession of the property from the mortgagor before a decree and sale, though the mortgage may provide for a receiver on default of the mortgagor.[4]

The general rule is that receivers will not be appointed in mortgage cases unless it clearly appears that the security is inadequate, or there is imminent danger of the waste, removal or destruction of the property; or that the rents and profits have been expressly pledged for the debt.[5] The appointment of a receiver pending foreclosure proceedings is a matter resting in the sound discretion of the court. Mere default in the payment of the debt is no ground for such appointment, unless by the terms of the mortgage the mortgagee is entitled to the rents.[6]

A court will not in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration. If the court perceives that the appointment of a receiver will produce greater injuries to those interested in the railroad than by leaving it in the hands then holding it, especially when a large majority of the stockholders and bondholders are opposed to the appointment, no apppointment will be made.[7]

Mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, though attended with

[1] Swan v. Mitchel, 82 Ia. 307.

[2] Wall Street Fire Insurance Co. v. Loud, 20 How. Pr. 95.

[3] Id.

[4] Degener v. Stiles, 6 N. Y. S. 474. But see section 548.

[5] Morrison v. Buckner, 1 Hempst. 442.

[6] Tysen v. Wabash Railway Co. 8 Biss. 247.

[7] Id.

decay and dilapidation incident to disuse, is not such destruction or waste as to entitle the mortgagee to ask for a receiver, so it has been said.[1] Where the mortgagee of personal property is in possession, a creditor or subsequent incumbrancer cannot maintain a suit in equity for the appointment of a receiver and adjustment of claims against the mortgagor.[2]

Upon a bill to foreclose a mortgage on a railway it was held that the allegations that the company had made default in the payment of taxes and had permitted part of the railroad to be sold for such taxes, and that the company is hopelessly insolvent and unable to pay its interest and other obligations, and operating expenses, and that the trustee had refused and failed to take action, sufficient to support the appointment of a receiver;[3] as are, also, the allegations that the property is insufficient to pay the mortgage debt, that the mortgagors are insolvent and refuse to deliver possession, and have failed to pay the taxes or keep the property insured as required by the mortgage.[4]

Where a mortgagee files his bill to foreclose a chattel mortgage and an attaching creditor seizes the property and offers it for sale, the court upon application of the complaining mortgagee will appoint a receiver with authority to make sale of the property in order to avoid a multiplicity of suits and to preserve the value of the property until the rights of the parties can be determined.[5]

The appointment of a receiver before the establishment of any apparent right to the property, is erroneous.[6] A receiver will not be appointed where, under the terms of the mortgage, the mortgagor is to retain possession until foreclosure, when the appointment is not necessary for the preservation of the property.[7] Nor where the mortgagee becomes the purchaser and brings suit to remove a cloud from the title.[8]

Where a corporation, engaged in running a newspaper and printing office, is greatly embarrassed by its debts, and there are dissensions existing between its officers likely to materially injure the value of the property, a receiver may be appointed in an action by a mortgagee for the foreclosure of his chattel mortgage and sale of

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[1] Union Mutual Life Insurance Co. v. Union Mills Plaster Co. 37 Fed. R. 286.

[2] McConnell v. Denham, 34 N. W. R. 298.

[3] Putnam v. Jacksonville, Louisville & St. Louis Railway Co. 61 Fed. R. 440.

[4] Jackson v. Hooper, 18 So. R. 254.

[5] Wiedemann v. Sann, 31 At. R. 211.

[6] Hardin v. Hardin, 34 S. C. 77.

[7] Chadbourn v. Henderson, 2 Baxter, 460.

[8] McLean v. Bresley's Administrator, 56 Ala. 211.

the mortgaged property, when the condition of the mortgage has not been performed.[1]

Section 531. **When a Receiver will be Appointed Before the Debt is Due.** — It frequently happens that the property covered by a mortgage is so managed as to cause it to deteriorate in value, and, sometimes the deterioration arises from natural causes apart from the management or use of the property. This will, in some cases, entitle the mortgagee to an injunction and a receiver. There is a similar equity, in general, when the mortgagor allows the interest to fall into arrears, or when the mortgage debt, according to the terms of the contract, becomes partially due. In such a case if the premises are indivisible, any proceeding by a court of equity to enforce the payment of the arrears necessarily affects the whole property; and, upon a proper application, a receiver may be appointed. When the security is in jeopardy a receiver may be appointed though the debt is not due.[2]

As the courts are extremely cautious in interfering with proprietary rights, this relief is very sparingly granted, and a strong case must be presented in order to move the court to act. Where there is simply an allegation of waste, the relief by injunction is generally sufficient, and the court will seldom appoint a receiver, but it may do so in a proper case.[3] An exceedingly strong case must be made out in the affidavits, in order to obtain such relief in favor of a mortgagee merely upon the ground that his interest has fallen into arrears, in as much as the bond generally affords a sufficient remedy. But where, owing to some agreement or condition in the mortgage, this cannot be enforced, a receiver may be allowed, as for example, where there was an agreement that the principal debt should not be called in until after the mortgagor's death.[4] In case of such an appointment, the payments are treated as being made by the mortgagor, and the receiver is considered to be his agent for that purpose.[5]

A receiver may sometimes be appointed before the debt is wholly due, especially where the debt is payable in installments, and one installment is due, and the premises are indivisible. The rule is well stated by the vice-chancellor in New York: "Where the property mortgaged is indivisible or so circumstanced, that upon a decree

[1] State Journal of Commerce v. Commonwealth Co. 43 Kas. 93.

[2] McMahon v. North Kent Iron Works Co. 2 Ch. (1891), 148.

[3] Brasted v. Sutton, 30 N. J. Eq. 462.

[4] Burrowes v. Molloy, 2 Jo. & Lat. 521; s. c. 8 Ir. Eq. 483. *Cf.* Newman v. Newman, cited in 2 Bro. C. C. 92, note 6; Mahon v. Crothers, 28 N. J. Eq. 567.

[5] Chinnery v. Evans, 11 H. of L. Rep. 115.

the whole must inevitably be sold in one parcel, * * * the statute provides that the whole shall be sold, unless the sum actually due with interest and costs, be paid before the sale, so that, on an installment of the mortgaged debt falling due, the mortgagee is, by force of the statute, entitled to a foreclosure against the whole property, for the payment of the whole debt secured. This right gives to the mortgagee an equitable claim to the rents and profits, upon the filing of his bill," the premises not being of a sufficient value to pay the debt with interest and costs, and the persons liable for the debt being of doubtful responsibility or insolvent.[1]

The rule is otherwise where the premises are divisible.[2] But there is no error in continuing a receiver, properly appointed in a foreclosure suit, after the final decree on the application of a junior mortgagee, whose debt is not due and who has filed a counter-claim setting up his demand, where he shows that the property is indivisible and the debtor is insolvent, and that the property has been sold for taxes and is less in value than the amount of the incumbrances.[3]

In an English case a receiver was appointed though neither the principal nor interest was due, there having been an execution levied on the goods of the mortgagor, a corporation, which were included in the mortgage, other actions against the company pending, and the company consenting.[4]

Though it has been said that default in the payment of the interest alone is not sufficient to warrant the appointment of a receiver,[5] yet where such default is accompanied by waste, mismanagement and conditions imperiling the security, a receiver will be appointed.[6] Default in payment of interest and inadequacy of the security call for a receiver.[7]

A mortgage bondholder of an insolvent railroad company, whose affairs are in such condition that it is about to break up, has a right to the appointment of a receiver and for an injunction against attacks upon the mortgaged property against peril, and the appointment of a temporary receiver, although no default has yet taken

[1] Quincy v. Cheeseman, 4 Sandf. Ch. 405. *Cf.* Morris v. Branchaud, 52 Wis. 187.

[2] Bank of Ogdensburgh v. Arnold, 5 Paige, 38; Hollenbeck v. Donnell, 94 N. Y. 342.

[3] Buchanan v. Berkshire Life Insurance Co. 96 Ind. 510.

[4] Edwards v. Standard Rolling-Stock Syndicate. 1 Ch. (1893). 574.

[5] Union Trust Co. v. St. Louis, Iron Mountain & Southern Railroad Co. 4 Dillon, 114.

[6] Hangan v. Netland, 51 Minn. 552; Union Trust Co. v. St. Louis, Iron Mountain & Southern Railroad Co. 4 Dill. 114.

[7] Hangan v. Netland, 51 Minn. 255.

place on the securities owned by the plaintiff, but a default is imminent and manifest.[1]

"While it is true, as a general rule, that appointing a receiver is auxiliary to the main purpose of the suit, and that no suit can be brought until the debt is due, when 'default is imminent and manifestly inevitable, though none has taken place, a receiver of a railroad company may be appointed on the application of a mortgage bondholder in order to prevent the breaking up and destruction of its business, and to protect the property against the attachments and executions in favor of other creditors.'[2] There is no reason for limiting this doctrine to railroad companies."[3] Accordingly, though the debt had not matured, and the mortgagor had not defaulted, it was held proper to appoint a receiver.

Section 532. **The Appointment of a Receiver of the Rents and Profits.**— There seems to have been much doubt in the minds of the early chancellors, as indicated by the conflict in the decisions, upon the question whether a mortgagee has any right to a receiver of rents and profits of the mortgaged premises, *pendente lite;* but it is now well settled that he has no such right as a matter of course, and, that, before he can obtain the relief, he must show either some existing equity — the general ground of the appointment being the inadequacy of the security, that is, the insufficiency of the premises to satisfy the debt and the insolvency of the mortgagor — or some agreement in the mortgage to the effect that he may have a receiver of such rents and profits, or that they have been pledged, or hypothecated by the mortgagor.[4] It is held that this power of a court of equity is a part of its incidental jurisdiction, not being dependent upon any statute, and that it will be exercised whenever equity requires that the rents and profits should be impounded and retained, to be applied in satisfaction of the debt as ascertained by the final judgment.[5]

In some jurisdictions this rule is disputed, and the courts incline to hold the parties strictly to the contract set out in the mortgage, upon the theory that the possession of the mortgagor ought not to be disturbed until the foreclosure becomes absolute. In some states

[1] Brassy v. New York & New England Railroad Co. 22 Blatchf. 72.

[2] Jones on Com. Banks & Mortgages, section 433.

[3] Thompson v. Natchez Water & Sewer Co. 68 Miss. 423.

[4] Williams v. Robinson, 16 Conn. 517; Price v. Dowdy, 34 Ark. 285. 290; Des Moines Gas Co. v. West, 44 Iowa, 23.

[5] United States Trust Co. v. New York, West Shore & Buffalo R R. Co. 101 N. Y. 478, 483; s. c. 2 Cent. Rep. 402.

this view is the result of the interpretation of a statute.[1] Where the appointment is allowed it creates a specific lien on the rents for the payment of any deficiency.[2]

In determining the sufficiency of the security afforded by the mortgaged property, the best criterion is the rental value, where the property is rented, and not the market value.[3] A receiver will not, however, be appointed where the debt is not due, and the mortgagee refuses to accept the offer of the widow of the mortgagor, who also joined in the mortgage, to pledge the rents of the premises, excepting only a certain portion allowed by statute for the support of herself and children.[4]

It is no defence to a motion for such an appointment that the mortgage was given to secure advances to be used in the erection of buildings on the premises, and that the mortgagee had failed to make the advances, so that the mortgagor had been compelled to advance a considerable sum to complete the work, and, then, in order to save his credit, to sell the buildings at a reduced price, it appearing that the parties had agreed, by a clause in the mortgage, to allow a receiver of the rents to be appointed in certain cases.[5] A mortgagor cannot, by forestalling costs, avoid the consequences of an appointment.[6]

A statutory provision authorizing the appointment of a receiver when there is established "an apparent right to property which is the subject of the action, and which is in the possession of the adverse party, and the property, or its rents and profits, is in danger of being lost or materially injured or impaired," does not authorize the appointment of a receiver of the rents and profits of mortgaged premises where the mortgagee has no lien on the rents and profits, and in the absence of any charge of waste.[7]

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[1] So in Michigan, Wagar v. Stone, 36 Mich. 364; Beecher v. Marquette & R. M. Co. 40 Id. 307; Hazeltine v. Granger, 44 Id. 503; and in California, Guy v. Ide, 6 Cal. 99. See also Cortelyeu v. Hathaway, 11 N. J. Eq. 39, and *cf.* sections 525, 526, *supra*.

[2] Astor v. Turner, 11 Paige, 436; s. c. 2 Barb. 444; Post v. Dorr, 4 Edw. Ch. 412; Lofsky v. Maujer, 3 Sandf. Ch, 69.

[3] Shotwell v. Smith, 3 Edw. Ch. 588.

[4] Bank of Ogdensburgh v. Arnold, 5 Paige, 38; Sea Insurance Co. v. Stebbins, 8 Id. 565. *Cf.* Williams v. Noland; 2 Tenn. Ch. 151. And see Hill v. Robertson, 24 Miss. 368, a case where the debt was due.

[5] MacKellar v. Rogers, 52 N. Y. Super. Ct. 360.

[6] Lofsky v. Maujer, 3 Sandf. Ch. 69 — where the owner of the equity received from the tenant a note for the accrued rent, but no actual payment had been made, and the receiver was held entitled to such rent in preference to him.

[7] Hardin v. Hardin, 34 S. C. 77. See Union Mutual Life Insurance Co. v. Union Mills Plaster Co. 37 Fed. R. 286, as to federal court following law of

Under a mortgage permitting the mortgagor to remain in possession of the railroad and collect, receive and use the revenue and profits thereof, it was held that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver or until in proper form he demands and is refused possession.[1]

Money paid for entrance to a theatre has been declared not to be rents and profits, and not the subject of a receivership.[2]

"When a mortagee commences an action to foreclose a mortgage and procure the appointment of a receiver of the rents of the premises upon the pround of the insufficiency of the security, such receiver becomes entitled to the rents accruing during the pendency of the action. * * * When the court recognizes his equitable right to the rents by the appointment of the receiver to collect them, then the right attaches to have them applied in extinguishment of the mortgage. * * * A specific lien upon such rents and profits is then obtained by the mortgagee, and he becomes entitled thereto."[3]

In an action to foreclose a mortgage the insolvency of the mortgagor or inadequacy of the security, and failure to apply the rents of the mortgaged premises in keeping up the securities, paying delinquent taxes and interest past due on a prior mortgage, is a sufficient ground for the appointment of a receiver *pendente lite* to collect the rents and so apply them. That the mortgagor at the time of making the first mortgage gave the mortgagee therein named a written assignment of these rents cannot be urged by the mortgagor as a reason why a receiver should not be appointed.[4]

Section 533. **The Rule Herein in New York.** — Where the owner of premises, leased by him for a term of years, at an annual rent of $1,500, executed a mortgage thereon to W, who assigned the same to the plaintiff, and the mortgagor, subsequently and before the mortgage debt became due, assigned to the defendant T, $4,500 of the rent first to accrue on the lease, of which assignment the plaintiff had notice, and the plaintiff brought suit for the foreclosure of the mortgage and asked for an injunction to restrain the defendant from receiving the rent, and for the appointment of a receiver, and the

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state courts upon receivers of rents and profits.

[1] Hook v. Bosworth, 12 U. S. C. C. Ap. 208; s. c. 64 Fed. R. 448.

[2] Cadogan v. Lyric Theatre, 3 Ch. (1894), 338.

[3] Donlon & Miller Manufacturing Co. v. Cannella, 34 N. Y. S. 1065.

[4] Farmers' National Bank v. Backus (Minn.), 66 N. W. R. 5.

injunction was issued, but no receiver appointed until the final decree, and it was also adjudged below that the plaintiff was entitled to the rent from the time the mortgage became due, it was held, on appeal, that the defendant should receive these rents up to the time of the appointment of the receiver, and the court said: "Courts of equity, adhering to the ancient practice, under certain circumstances, will, after default, in an action for foreclosure and sale, anticipate the final judgment of the court by the appointment of a receiver, and, in effect, put the mortgagee in possession, and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage. To entitle him to this species of equitable ejectment it must appear that the mortgaged premises are an inadequate security for the debt, and that the mortgagor or other person liable for the mortgage debt is insolvent. * * * But when other parties have acquired rights before default, and especially before the happening of those contingencies which give the mortgagee any right to such relief — that is, when the right or interest of the third party accrued before the insolvency of the mortgagor — conflicting equities may arise between which the court would not decide, but leave the mortgagee to his direct remedy by judgment, and under such circumstances I find no case in the courts of this state in which the court has given the mortgagee this equitable possession of the premises before final judgment, or by such final judgment has given him possession *nunc pro tunc*, so as to enable him to collect rents which had previously accrued."[1]

But, as a general rule, rents of mortgaged property received by a receiver appointed in a foreclosure action between the date of the certificate and the day fixed for final payment, cannot be received by the mortgagee without being taken into account between mortgagor and mortgagee, and a fresh date being fixed for redemption; but where the order of appointment is specially worded, and allows successive periods of redemption, and provides that any person redeeming, or, in the event of foreclosure, the plaintiff is to be at liberty to apply, in chambers, for the payment or transfer to him of any money in the hands either of the receiver or the court. And where the chief clerk has made his certificate and the times fixed for redemption had expired, and further sums had been received by the receiver since the date of the certificate, it was held that, owing to the special terms of the order, the mortgagee was entitled to a decree for foreclosure absolute, and for the payment of moneys re-

[1] Syracuse City Bank v. Tallman, 31 Barb. 201, 208.

ceived by the receiver without any further account being taken, or fresh date being fixed for redemption.[1]

Section 534. **Miscellaneous Defences in These Cases—Bankruptcy Proceedings, etc.**—It has been held that after an appointment has been made, the fact that an assignee in bankruptcy has sold all the mortgagor's rights in the property, will not deprive the mortgagee of his right to so much of the rents received as will make up the deficiency.[2] The assignee, in any case, takes the interest of the bankrupt in the premises, subject to any equity existing in favor of the mortgagee to a receiver. Thus, where, in an action to foreclose a mortgage, the complaint and *lis pendens* were filed on September 14, 1875, the mortgagor having been served on the 11th, after he had filed a petition in bankruptcy, and twelve days before he was adjudged a bankrupt; and on the first of October following, a receiver of the rents was appointed, upon an application made by the mortgagee on the 29th of September; an order made in March following, settling the receiver's accounts and directing the balance to be paid to the assignee, was held erroneous.[3]

But where a receiver was appointed on a creditor's bill, filed by a mortgagee in behalf of himself and others, in which no reference to the mortgage was made, and the bill was subsequently dismissed, the mortgagee was held not entitled to the rents collected, although he afterwards filed a bill for a foreclosure;[4] nor is he entitled to them, if the receiver were appointed in a different suit, although he has notified the tenants to attorn to him;[5] nor has he any title to the rents paid into court by a receiver appointed in a suit to establish the will of the mortgagor, even though he had given notice to the tenants to pay such rents to him; he ought to have followed up the notice by a motion to discharge the receiver.[6]

Where the receiver continued in possession and collects the rents after being ordered to be discharged and to pay them to the mortgagee in possession, his possession will be deemed that of the mortgagee.[7]

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[1] Colman v. Llewellyn, 56 L. J. R. (Ch. Div.) 1.

[2] Post v. Dorr, 4 Edw. Ch. 412. But see, *contra*, *In re* Bennett, 2 Hughes, 156—where the receiver was refused on the ground that the powers and duties of the assignee were similar to those of a receiver.

[3] Hayes v. Dickinson, 9 Hun, 277. *Cf.* Rider v. Bagley, 84 N. Y. 461.

[4] Scott v. Ware, 65 Ala. 174.

[5] Coddington v. Bispham, 36 N. J. Eq. 574.

[6] Thomas v. Brigstocke, 4 Russ. 64.

[7] Horlock v. Smith, 11 L. J. (N. S.) Ch. 157; s. c. 6 Jur. 478.

And where the rent is payable between the day of sale and the time when the purchaser will be entitled to the possession, the rent belongs to the owner of the equity of redemption.[1] So, also, where a defendant makes a plea which is not ultimately sustained and, in the meanwhile, he retains possession of the premises and collects the rents and profits thereof, which, upon the sale, are found to be insufficient to pay the amount due, he will be ordered to pay the extra costs occasioned by his defence.[2]

There is a dictum of Lord Thurlow to the effect that the mortgagor is liable for any loss in the rents due to the negligence or default of the receiver appointed on the application of the mortgagee.[3]

Section 535. **Of the Right of the Receiver to Accrued Rents Unpaid.**—It is established in some jurisdictions and is the general rule that where a receiver of the rents and profits of the mortgaged premises has been appointed, he acquires a right to all rents which have accrued and remain unpaid; the mortgagee is said to have an equitable lien on them.[4] It is said he has an equitable lien on the unpaid rents and will be entitled to them to the extent of any deficiency in the security.[5] But if the owner of the equity of redemption collects rents pending the motion for a receiver, he can not be compelled to account for them;[6] and if an assignee in bankruptcy has collected them before the appointment, such assignee is entitled to a preference,[7] and the same is true of any person who has been in possession and has collected them.[8] And where a note and a chattel mortgage were given to secure accrued rent, the receiver is entitled to both the securities as well as to the original rent.[9]

The tenant cannot, in a suit brought by the receiver to recover such rents, raise the question of the propriety of the appointment. It is then *res adjudicata*.[10]

Where the mortgage provided that the mortgagee should, under

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[1] Aster v. Turner, 11 Paige, 436; Mitchell v. Bartlett, 51 N. Y. 447; Clason v. Corley, 5 Sandf. Super. Ct. 447.

[2] Bank of Plattsburgh v. Platt, 1 Paige, 464.

[3] Rigge v. Bowater, 3 Bro. C. C. 365.

[4] Howell v. Ripley, 10 Paige, 43; Conover v. Grover, 31 N. J. Eq. 539; Gaynor v. Blewitt, 82 Wis. 313.

[5] Stephen v. Reibling, 45 Ill. App. 40; Woodyatt v. Connell, 38 Ill. App. 475.

[6] Rider v. Bagley, 84 N. Y. 461. *Cf.* Silverman v. Northwestern Mutual Life Insurance Co. 5 Bradw. 124.

[7] Rider v. Vrooman, 12 Hun, 299, affirmed, *sub. nom.* Rider v. Bagley, 84 N. Y. 461.

[8] Argall v. Pitts, 78 N. Y. 239; Noyes v. Rich, 52 Me. 115.

[9] Lofsky v. Maujer, 3 Sandf. Ch. 69.

[10] Goodhue v. Daniels, 54 Iowa, 19.

certain conditions, be entitled to a receiver of the rents and profits, the provision was declared not to be sufficiently broad to include rents and profits which had accrued prior to the appointment.[1] The court said: "It is extremely doubtful whether a receiver of the rents and profits in a foreclosure case can reach rents accrued prior to the commencement of the suit in which he was appointed. * * * The receiver's clause in the mortgage does not in terms refer to the rents in arrear at the time of default."

In Alabama it has been declared that where the mortgage does not cover rents which accrued prior to the appointment of the receiver, he is not entitled to them.[2]

Section 536. **Of a Receiver of Growing Crops.**— A right to have a receiver of crops growing on the mortgaged premises, may arise in various ways in favor of the mortgagee. He may have a mortgage covering only the crops, or there may be a covenant in the mortgage of the land, or some other instrument which confers the right, or there may be a mortgage merely of the issues and profits of the property. In each of these cases the right has been recognized.

In the first class of cases it has been held that he may have a receiver to protect the crops pending a litigation concerning his rights thereto, even though he could not appropriate them to himself.[3] And where the mortgagor and his grantee were both insolvent and the premises were an inadequate security, the grantee having been put into possession under an agreement to reduce the mortgage one-fourth, and having refused to do so, but offering to sell the property for the amount of the incumbrance after he had reaped the crops, it was held that the mortgagee were entitled, under the circumstances, to a receiver to take charge of the crops.[4] And where certain merchants in London agreed to become sureties for a West India planter, in order to relieve his plantation from a sequestration, upon being secured by a conveyance of the plantation, in trust, with a covenant that they should be continued as consignees until the expiration of five years after actual reimbursement of what they might advance, for the purpose of securing the due performance of certain covenants therein contained, they are entitled to performance of the covenants, and it is not such an oppressive enforcement

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[1] Mutual Life Insurance Co. v. Beknop, 19 Abb N. C. 345.

[2] Alabama National Bank v. Mary Lee Coal & Railway Co. (Ala.) 19 So. R. 404.

[3] Simpson v. Robert, 85 Ga. 180.

[4] Cortelyeu v. Hathaway, 11 N. J. Eq. 48.

of the deed as to warrant the appointment of a receiver.[1] Pending the foreclosure of a mortgage on a farm, a receiver was, with the written consent of the solicitors of all the parties in interest, appointed, with power to let the premises. It was held, that he could let the farm for a year without a special order, that being the usual term for such leases, and that such lease was neither limited nor terminated by the duration of the suit.[2] And where the mortgage covers the rents, issues and profits of the property, and, in foreclosure proceedings, a receiver is appointed, who grows and harvests a crop on the property, the proceeds may be applied to the reduction of any deficiency arising upon the sale.[3] But a receiver acquires no title to a crop as against a purchaser where the mortgagor is in possession, and the crops are sold under an execution against him before the appointment.[4]

In an order for a manager with a direction to receive and remit the rents and produce, that produce is not comprised which had already been severed and sent away to the persons appointed consignees by the mortgagor, but which had not, at the time of making the order, been received by the consignee or mortgagor. It was so held, where the mortgagor was in possession of a West Indian estate, had full control and management of it, and was dealing with it as his own at the time the order was made, and had severed the produce and sent it to his consignee in England, subject to their claim for advances made for the purposes of the estate, and also to other claims which he had created by contract with them, he having received advances of money from the consignees upon the understanding that they should repay themselves out of the consignments.[5]

Section 537. **Of the Appointment in Certain Cases.**— A court of equity, owing to its method of acting *in personam*, is not required to have the subject matter of the litigation within the geographical bounds of its jurisdiction. It will, therefore, when occasion requires, appoint a receiver over property situated beyond its jurisdiction.[6] Accordingly the English court of chancery has appointed a receiver of property situated in the West Indies, the receiver being the mortagee and not being required to give security.[7] But in order

[1] Bunbury v. Winter, 1 Jac. & W. 255.

[2] Shreve v. Hankinson, 34 N. J. Eq. 413, 415.

[3] Montgomery v. Merrill, 65 Cal. 432.

[4] Favorite v. Deardoff, 84 Ind. 555.

[5] Codrington v. Johnstone, 1 Beav. 520.

[6] Langford v. Langford, 5 L. J. (N. S.) Ch. 60.

[7] Davis v. Barrett, 13 L. J. (N. S.) Ch. 304.

to move the court to make such an appointment, it must have jurisdiction of all the parties in interest,[1] and there must be an action pending;[2] but it is not necessary to have a prayer for one in the bill;[3] the necessity may appear on affidavits.[4]

Upon the application for a receiver of mortgaged premises, the court must be informed as to the possession, which must be either in a party to the suit or the tenant of a party, and there must also be proof of due notice of the application.[5] But if the tenant is not made a party to the suit, his possession can not be disturbed by the appointment; he can only be ordered to attorn and pay the rent to the receiver.[6] And if the application is made after default in appearing or pleading, the plaintiff should show the amount due for principal, interest and costs, less all just credits, as well as the fact of possession.[7]

When the mortgaged premises can be sold in parcels, and a sale of a part will satisfy the debt and costs, a receiver will not be appointed of the entire property where the entire principal is not due;[8] and in any case the receiver may be limited to that portion primarily liable.[9] Under the English practice, while the application must, in the first instance, be heard in court, if the office becomes vacant by death or otherwise, and the object is merely to fill the vacancy, it may be made in chambers.[10]

A receiver may be appointed before the merits of the case have been disclosed, either by a default or answer filed; but in order to empower a court to make such an appointment, strong grounds must be laid; as, for example, that the defendant has withdrawn himself from the jurisdiction for the apparent purpose of avoiding service of process, or that the measure is taken to save the property from waste, or to prevent its removal beyond the jurisdiction of the

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[1] Shaw v. Shore, 5 L. J. (N. S.) Ch. 79.

[2] Astor v. Turner, 2 Barb. 444, s. c. 1 Paige, 436; Kattensroth v. Astor Bank, 2 Duer, 632; Hardy v. McClellan, 53 Miss. 507.

[3] Malcolm v. Montgomery, 2 Moll. 500; Osborne v. Harvey, 1 Younge & C. Chan. 116.

[4] Commercial, etc., Bank v. Corbett, 5 Sawyer, 172.

[5] Sea Insurance Co. v. Stebbins, 8 Paige, 565; Rogers v. Newton, 2 Ir. Eq. 40. *Cf.* Zeiter v. Bowman, 6 Barb. 133; Keep v. Michigan L. S. R. R. Co. 6 Chicago Legal News, 101.

[6] See Insurance Co. v. Stebbins, *supra*.

[7] Rogers v. Newton, *supra*.

[8] Hollenbeck v. Donnell, 94 N. Y. 342; Quincy v. Cheeseman, 4 Sandf. Ch. 405; Morris v. Branchaud, 52 Wis. 187; Bank of Ogdensburgh v. Arnold, 5 Paige, 38.

[9] Tressilian v. Caniffe, 4 Ir. Ch. (N. S.) 399.

[10] Grote v. Bing, 9 Hare. Ch. Appendix, 50.

court, or that there is some element of fraud involved.[1] The appointment may be made even before service.[2]

Where a receiver is appointed at the instance of a mortgagee over property on which the mortgagor carries on business, the receiver cannot be directed to manage the business unless it is in express terms or by implication included in the security.[3]

Section 538. **Defences to the Appointment of a Receiver in These Cases.**— To oppose the appointment of a receiver in these cases, the defendant may set up any defence cognizable in a court of equity. This is generally done by traversing the allegations of the petition and by setting up new matter. Thus, a mortgagor may plead facts showing that the property is a sufficient security, or he may make a special affidavit of merits.[4] But to show that the mortgage was given to secure advances to be used in the erection of buildings on the mortgaged premises, and that the mortgagee had failed to keep his agreement to make the advances, and on account of such default, that the mortgagor was compelled personally to advance a large sum and then to sell the houses so erected at a reduction from their actual value, in order to save his credit, does not constitute a good defence, where there is a covenant to allow a receiver in certain cases under which the application is made.[5]

Nor is the mortgagor in a position to oppose the appointment after he has sold the premises subject to the mortgage, in as much as he has no interest in the rents and profits, nor in the possession; and this is the rule whether the application be made before or after the decree of foreclosure.[6] Nor, where the premises are in the possession of a tenant, whether he be before the court or not, the difference merely being that where he is not before the court, he will be required to attorn and pay the rents over to the receiver instead of to the mortgagor, there being no power in the receiver to molest his possession.[7] And where the tenants go into possession, with

[1] Whitehead v. Wooten, 43 Miss. 523; *Ex parte* Whitfield, 2 Atk. 315; Meaden v. Sealey, 6 Hare, 620; Caillard v. Caillard, 25 Beav. 512; McCarthy v. Peake, 9 Abb. Pr. 164.

[2] Barrett v. Mitchell, 5 Ir. Eq. 501; Dowling v. Hudson. 14 Beav. 423.

[3] Whitley v. Chellis, 1 Ch. (1892), 59.

[4] Sea Insurance Co. v. Stebbins, 8 Paige, 585; Bancker v. Hitchcock, 1 Ch. Dec. (N. Y.) 88; Lofsky v. Maujer, 3 Sandf. Ch. 69; Darcy v. Blake, 1 Moll. 247; Shepherd v. Murdock, 2 Id. 531; Leahy v. Arthur, 1 Hog. 92.

[5] MacKeller v. Rogers, 52 N. Y. Super. Ct. 360.

[6] Wall Street Fire Insurance Co. v. Loud, 20 How. Pr. 95; Smith v. Tiffany, 13 Hun, 671.

[7] Keep v. Michigan Lake Shore R. R. Co. 6 Chicago Legal News, 101; Sea Ins. Co. v. Stebbins, 8 Paige, 565.

knowledge of the existence of the mortgage and the insolvency of the mortgagor, under an agreement to work the property — a saw mill — using materials belonging to the mortgagee, in order to secure and pay off certain advances made by them, their equitable right after the appointment of a receiver, is inferior to that of the mortgagee, and they may be required either to surrender their possession or to pay a reasonable rent.[1]

And where the mortgagor has a right to the rents under the exemption laws of the state, he should assert the exemption in the proceedings for a receiver, or he will be considered to have waived it and he will not be permitted subsequently to recover such rents in an action against the receiver.[2] An offer to give security or a pledge, or a bond, or to make a deposit in court, for the payment of the principal sum, or interest, will effectually prevent the appointment of a receiver. Thus, where the application was made to secure the payment of interest, and the widow of the mortgagor, who also joined in the mortgage, offered to relinquish the rents of all the mortgaged premises, except a certain part, reserved as her dower interest, and to permit the mortgagees to receive them to keep down interest until the debt became due, the offer seemed sufficient to the court, and a receiver was refused.[3]

But in Hill v. Roberson,[4] the mortgagor, knowing that the mortgagee intended to apply for a receiver, made an application for the appointment of himself as receiver, and offered to execute a bond with good security, to account for the income of the property; which application was refused, but an appointment was made upon the application of the mortgagee. Where an appeal was taken from a decree, and the property was kept in good condition, the appeal bond affording adequate security, no receiver was appointed.[5] And the same decree was made in a case of the foreclosure of a chattel mortgage, where the defendants deposited, in court, a sufficient amount to secure the payment of any judgment that might be recovered.[6]

At times the nature of the property is such that a receiver will not be allowed, as, for example, where the property is a statutory homestead and the effect of the appointment would be to deprive

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[1] Mutual Life Ins. Co. v. Spicer, 12 Hun, 117.

[2] Storm v. Ermantrout, 89 Ind. 214.

[3] Bank of Ogdensburgh v. Arnold, 5 Paige, 38. In this case the entire mortgage debt was not due, and the reservation was made in respect of land not necessary to be sold at the time.

[4] 24 Miss. 368.

[5] Adair v. Wright, 16 Iowa, 385.

[6] Welch v. Henry, 32 Kan. 425.

the defendants of its enjoyment.[1] Acquiescence qualifies equitable relief, and the fact that the mortgagee has acquiesced in the condition of the property by taking no proceedings to obtain a receiver, although the mortgage has been long due, and a considerable time has elapsed since the decree of foreclosure, will operate to defeat his subsequent application.[2]

The order is sometimes made in the alternative, that unless the possession is delivered up, or security given, or a deposit made, a receiver will be appointed.[3]

Section 539. **In the Case of Mortgages of Corporate Property.** — The same general rules apply to the case of receivers of corporate property, pending proceedings to foreclose a mortgage. The courts, however, are somewhat more cautious in these cases, and more disposed to insist upon full evidence of the necessity of the appointment.[4] Where an application was made by trustees of an underlying mortgage to have railroad property covered by their mortgage turned over to receivers appointed in a foreclosure suit, the application was denied "for the present," in view of negotiations for the sale of the entire system under the general mortgage thereon, and the court said that when the decree directing such sale should be settled, the court would dispose of all these questions at once, instead of taking them up one by one, so that no party might suffer material wrong.[5]

A court has power, in a suit for the foreclosure of a mortgage upon the property of a corporation, to order its receiver to pay employes of the company in full for services rendered within six months before his appointment.[6] And where a deed of trust authorized the trustee to take possession in certain cases, and an occasion presented itself for the exercise of this power, but the trustee refused to take possession, although requested by the bondholders, a receiver was appointed upon their application, and it was held that the relief would be granted independently of any question

[1] Hoge v. Hollister, 8 Baxt. (Tenn.) 533. *Cf.* Callanan v. Shaw, 19 Iowa, 183.

[2] Cone v. Combs, 5 McCrary, 651.

[3] Frelinghuysen v. Colden, 4 Paige, 204. In this case a bill to redeem was filed by an insolvent in possession, on the ground that he had not been made a party to the foreclosure suit, the application having been made by the mortgagee.

[4] Ruggles v. Southern Minnesota R. R. Co. 17 Inter. Rev. Rec. 29; Keep v. Michigan Lake Shore R. R. Co. 6 Chicago Legal News, 101.

[5] Central Trust Co. v. Wabash, St. Louis and Pacific R. R. Co. 25 Fed. Rep. 693, 695, 696.

[6] Olyphant v. St. Louis Ore and Steel Co. 22 Fed. Rep. 179, 180. See chapter 12.

of loss or depreciation of the value of the property.[1] And where a corporation in a *quasi* public nature, issued bonds, which were made a lien on its assets, in order to raise funds to complete an enterprise, and all its property was pledged for the payment of the principal and interest, the bonds were considered so much in the nature of a mortgage as to authorize the appointment of a receiver, where there was a default in payment and the corporation was insolvent and the property was endangered.[2]

An equitable mortgagee is entitled to a receiver upon the same grounds which justify the appointment in other cases; and where a liquidator has been put into possession of the corporate effects, he will be made the receiver, unless there are good grounds of objection.[3] And it is no ground of objection to the appointment of a receiver, that there are a large number of mortgagees of the property, and that they are contented with the management of the affairs.[4]

The receiver of corporate property, subject to a mortgage, represents all the parties in interest. Thus, where the corporation went into bankruptcy, pending foreclosure proceedings, and a receiver was appointed therein, it was held that he represented the assignees in bankruptcy, creditors and shareholders, as well as the mortgagees, and that a sale would not be ordered which would be hostile to their interests.[5]

Where an action was pending to subject a railroad to sale for the payment of its mortgage debts, and the president and directors of the company were ordered to continue in the possession and management of its property of all kinds, under the order of, and subject to the court, and to conduct and carry on the business of the company, and to make report to the court, when required, of the condition of the property, to the end that such orders might be moved for as were necessary for the protection of the property of the company, and to the interest of all parties concerned, it was held that, by this order, the president and directors, and their successors in office were constituted receivers of the court, and that a change of incumbent in the office of receiver did not affect the *status* of claims against the property arising during such receivership.[6]

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[1] Warner v. Rising Fawn Iron Co. 3 Woods 514.

[2] White Water Valley Canal Co. v. Vallette, 21 How. 414.

[3] Perry v. Oriental Hotels Co. L. R. 5 Ch. App. 420. *Cf.* Boyle v. Bettws Llantwit Colliery Co. 2 L. R. Ch. D. 726.

[4] Fripp v. Bridgewater Co. 11 Hare, 239; s. c. 17 Jur. 887, and 22 L. J. 1084. In this case the applicant represented one-ninth of mortgage debt.

[5] Sutherland v. Lake Superior Ship Canal Co. R. & I. Co. 9 Nat. Bank. Reg. 307.

[6] *Ex parte* Brown and wife, 15 S. C. 518, 531.

Section 540. **In the Case of Chattel Mortgages.**—A receiver may be appointed in the interest of a mortgagee of chattels, when they have been seized under attachments issued in favor of claims subsequent to the mortgage. This is done in order to prevent waste and loss pending the determination of the interests of all the parties.[1]

One may also be appointed at the instance of a judgment creditor of the mortgagor, where part of the property has been sold by the mortgagee, and the residue is held as trustee for certain creditors, and the mortgagor is about to dispose of it, where such disposition is likely to be to the prejudice of the creditor.[2] But where the defendants, in a foreclosure suit, deposit in court a sufficient amount to secure the payment of any judgment recovered, the application will be refused;[3] and, also, where the security is adequate and the mortgagor will give a bond, with good security, for the forthcoming of the property to answer the decree, a receiver will not be appointed.[4] Nor will the relief be granted at the instance of the mortgagor, as long as the debt is unpaid, where the property is in the possession of the mortgagee, upon the ground of apprehension that it may possibly be transferred to a *bona fide* purchaser.[5]

It has, furthermore, been held, in New York, that the court has no constitutional power to appoint a receiver of chattels held by a mortgagee in possession, except in case of necessity to secure the rights of others, for the reason that it impairs the obligation of the contract, and the legislature cannot confer such authority.[6] And, in a suit by creditors, to set aside a chattel mortgage, on the ground that it was given with intent to defraud creditors, a receiver will not be appointed, in the first instance, where the fraud is denied, and it is not shown that the mortgagee is insolvent or irresponsible.[7] And a judgment creditor is not entitled to a receiver, pending a suit to enforce his lien against the personal property of the debtor, as against a mortgagee in possession, where no fraud or improper conduct can be imputed to the latter.[8]

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[1] Crow v. Red River County Bank, 52 Tex. 362. As to when a statutory receiver may be appointed, in such a case, in Iowa, see Maish v. Bird, 59 Iowa, 307.

[2] Gouthwaite v. Rippon, 8 L. J. (N. S.) Ch. 139.

[3] Welch v. Henry, 32 Kan. 425.

[4] Williams v. Noland, 2 Tenn. Ch. 151, 155.

[5] Bayaud v. Fellows, 28 Barb. 451.

[6] Patten v. Accessary Transit Co. 4 Abb. Pr. 235; s. c. 13 How. Pr. 502.

[7] Rheinstein v. Bixby, 92 N. C. 307.

[8] Furlong v Edwards, 3 Md. 99. In this case the mortgagor was in posses-

Section 541. **In the Case of Equitable Mortgages.**—That form of lien known in courts of equity as an equitable mortgage gives rise, in a variety of instances and under various circumstances, except where the rights of third parties intervene, to equities which warrant the appointment of a receiver, according to the general rules which govern in cases of mortgages at law. Thus, a receiver of the rents and profits may be appointed, in the interest of a mortgagee, in a suit to foreclose such a mortgage, where the essence of the lien consists of a deposit of title deeds and an agreement to execute a legal mortgage. This has been held proper in the case of an equitable mortgage, by tenants in common, all of whom joined in the deposit, while but one was before the court, he alone being in possession, and in receipt of all the rents.[1] And where an annuity was so charged on a benefice as to create an equitable mortgage, a receiver of the income was granted to the annuitant in preference to later judgment creditors.[2]

A receiver, however, will not be granted the holders of bonds and obligations, issued by municipal officers for the purpose of raising funds for public improvements under an act of Parliament authorizing them to levy rates and assessments, and to borrow money on the security thereof, for that purpose, when there has been no default in the payment either of principal or interest.[3] The rights of a junior mortgagee to a receiver, on the theory of the English courts that all mortgages subsequent to the first are equitable, will be considered when treating of the rights of junior mortgagees.[4]

Section 542. **In the Case of Mortgages of Leaseholds.**—A receiver may be appointed in a suit to foreclose a mortgage upon a leasehold, as well as if the estate, or interest, were a fee. This relief, in cases of this nature, is considered peculiarly appropriate, in as much as such security, from the nature of the estate, is chiefly valuable for the income, and because this might be purposely depreciated, if not wholly lost, by a protracted litigation. But, in order to obtain the appointment, the same proofs of inadequacy and

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sion as agent of the mortgagee and was selling the property to satisfy the latter's claims.

[1] Holmes v. Bell, 2 Beav. 298; Aberdeen v. Chitty, 3 Younge & Coll. 379. In the last case the appointment was made before answer. *Cf.* Shakel v. Duke of Marlborough, 4 Madd. 463—which was an action for specific performance of an agreement to execute a mortgage.

[2] Battersby v. Homan, 2 Ir. Ch. (N. S.) 232.

[3] Preston v. Corporation of Great Yarmouth, L. R. 7 Ch. Ap. 655.

[4] See upon this point, Meaden v. Sealey, 8 Hare Ch. 620.

insolvency, or irresponsibility, must be shown, as are required, in general, in other cases.[1] And where a junior mortgagee was, upon his own application, appointed a receiver of the rents and profits, and subsequently a prior mortgagee foreclosed his mortgage, after which the accounts of such receiver were settled by directing him to pay out certain amounts, and to pay the remainder of the fund to the prior mortgagee, this on appeal, was held error, since the receivership was instituted for the benefit of the junior mortgagee only, and upon the further ground that, until the prior mortgagee applied for, and obtained a receiver for his own benefit, which receivership would supersede the first, he had no right to the rents any more than if the mortgagor had collected them.[2]

Section 543. **Of Provision in Mortgage for a Receiver.** — It is becoming somewhat usual to insert in the mortgage an agreement, or covenant, to the effect that, upon certain specified contingencies, such as default in the payment of interest, taxes, assessments and the like, within a certain period, the mortgagee shall have power to move for the appointment of a receiver of the rents and profits of the mortgaged premises. This course has been adopted to such an extent in England that it has been deemed a proper subject for legislative control;[3] and the statute which has there been enacted, prescribes with much precision, the cases in which a receiver may be appointed, and defines his powers and duties.[4]

"Although a court of equity will not enforce a provision in a mortgage which provides for the appointment of a receiver when under all the circumstances it is inequitable to take the property out of the owner's possession pending an action to foreclose the mortgage, the fact that the parties have agreed that in case of a default a receiver shall be appointed, should have great weight when an application for a receiver is made. When such a provision is contained in a mortgage, and it further appears that the mortgage sought to be foreclosed is a second mortgage, that the parties in possession of the premises refuse to pay the interest on the first mortgage and the taxes and assessments on the property, but receive the rents and refuse to apply them for the benefit of the

[1] Astor v. Turner, 2 Barb. 444; Barrett v. Mitchell, 5 Ir. Eq. 501. In the latter case the receiver was appointed before process, it being shown that the landlord threatened an eviction for the non-payment of the rent.

[2] Ranney v. Peyser, 83 N. Y. 1.

[3] Stat. 23 & 24 Vict. ch. 145; 100 Eng. Stat. at Large, 782.

[4] For cases before the statute, see Jolly v. Arbuthnot, 4 DeG. & J. 224; Jeffreys v. Dickson, L. R. 1 Ch. Ap. 183; Law v. Glenn, 2 Id. 634.

property, the appointment of a receiver becomes necessary for the protection of the mortgagee, and equity requires that the agreement should be specifically enforced."[1]

It is proper to provide in a mortgage for the appointment of a receiver, and such provision will be enforced.[2] But when the security is ample, a receiver will not be appointed before decree and sale, though the mortgage provide for a receiver.[3]

Where a mortgage covered all earnings of the company, it was held that a garnishment of earnings deposited in bank, prior to the appointment of the receiver, deprives the mortgagee of all right thereto.[4]

Section 544. **When Receivers will be Appointed as Against a Mortgagee.**—There is an early English case in which a receiver was appointed upon the application of one of several mortgagors, in order to keep down the interest on the mortgage, and this was done in the face of opposition by the mortgagee, who had not taken possession of the premises.[5] But an application made by a judgment creditor of an adjudged bankrupt was refused, where a junior mortgagee was in possession.[6]

To authorize a court to interfere with a mortgagee in possession, there must exist some equitable ground, such as fraud or imminent danger to the property, or the commission of waste; and where all the mortgagee's doings are within the scope of his powers, a receiver will not be appointed.[7] Thus, where the trustee under a mortgage given to secure creditors, entered into the possession and was selling the property and applying the proceeds in liquidation, a receiver was refused upon the motion of the creditors, no fraud or improper conduct being charged.[8] And where a judgment creditor of the mortgagor has had a receiver appointed, in aid of his judgment, the mortgagee may come in and have the receivership extended in favor of himself, upon showing the inadequacy of his security.[9] But a

[1] Keogh Manufacturing Co. v. Whiston, 26 Abb. N. C. 358.

[2] Nichols v. Peninsular Stove Co. 48 Ill. Ap. 317; Hubbell v. Avenue Investment Co. 66 N. W. R. 85.

[3] Degener v. Stiles, 6 N. Y. S. 474.

[4] Gilbert v. Washington City, Virginia Midland and Great Southern Railroad Co. 33 Gratt. 645.

[5] Newman v. Newman, cited in 2 Bro. C. C. 92 (note 6.) *Cf.* Main v. Ginthert, 92 Ind. 180.

[6] Ryan v. Lefroy, 3 Ir. Ch. (N. S.) 351.

[7] Bolles v. Duff, 35 How. Pr. 481, 483; Boston & P. R. R. Co. v. New York & New England R. R. Co. 12 R. I. 220; Cummings v. Cummings, 75 Cal. 434.

[8] Furlong v. Edwards, 3 Md. 99. In this case the mortgage covered personal property only.

[9] Trye v. Earl of Aldborough, 1 Ir. Ch. (N. S.) 666.

receiver will not be appointed as against a mortgagee in possession provided he will swear that something remains due him.[1]

As against a mortgagee in possession of the mortgaged property a receiver will not be appointed in favor of one claiming a subsequent lien thereon by seizure under execution, but the court will compel the application of the rents and profits of the property to the satisfaction of the mortgage by injunction. "Against a mortgagee in possession, the general rule is not to appoint a receiver in favor of subsequent lienholders."[2]

Section 545, **The Mortgagee as the Receiver.**—The powers and duties of a mortgagee, who has been appointed receiver of the mortgaged property, are set forth in the opinion in the case of Bolles v. Duff,[3] as follows: "By accepting the office or position of receiver, he must be deemed to have assumed the duties and responsibilities of a receiver, unqualified or unmodified by the fact or circumstance that he has been declared to be a mortgagee in possession, or by the fact or circumstance that he claimed the decree (appointing him) to be erroneous, and that he was, and finally might be held to be, the absolute owner. His relations, claims and interest, as to the property, might have been, and probably were, urged against the fitness of his appointment as receiver; but having been appointed, and having accepted, such relations, claims and interest must not be permitted to interfere with his duties as receiver, or with the purpose or interests for which he was appointed. * * * His duty as receiver clearly was to increase the surplus beyond what should be found due him as mortgagee, by getting as large a rental as he could for the trust property; and on his application to the court, as receiver, for authority to lease, it was his duty to lay before the court all the information he had, or could, with reasonable diligence, have acquired, as to the situation and value of the trust property."

It has been held in England that where a mortgagee has been appointed receiver, he is not entitled to any compensation for the performance of his duties.[4] In an English case, where the court of chancery appointed a mortgagee the receiver of the mortgaged

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[1] Quinn v. Brittain, 3 Edw. Ch. 314.

[2] United States v. Masich, 44 Fed. R. 10.

[3] 54 Barb. 215.

[4] Langstaffe v. Fenwick, 10 Ves. 405; Scott v. Brest, 2 T. R. 238. It should seem that a contrary rule was laid down in Ranney v. Peyser, 88 N. Y. 1, where the mortgage covered a leasehold, and the mortgagee went into possession as receiver and collected rents, it being held that he was entitled to all he collected.

premises, which were situated in the West Indies, it did not require him to give security.[1]

Section 546. **When a Receiver will be Appointed After the Decree.**—The court will appoint a receiver even after the decree of foreclosure, upon proof that the interest of all the parties will be promoted.[2] The mortgagor who is out of possession cannot object to the appointment on the ground that those in possession have not been made defendants, and have not been notified of the proceedings.[3] The necessity for such an appointment, by reason of the inadequacy of the security, may not appear until a sale has been made and the amount due on the bond has been determined. And where the mortgagor is entitled to the possession until the end of the period of redemption, if, in addition to the inadequacy of the security, he acts in bad faith and with fraudulent intent, a receiver will be appointed.[4] And the same rule obtains where the principal and interest remain unpaid and the mortgagor, who is insolvent, allows the property to be sold for taxes.[5]

So, also, a receiver was allowed to the mortgagee, where the mortgagor had obtained an injunction against the sale until certain counter claims could be passed upon, and the sum really due ascertained. Such a receiver will be empowered to take charge of the property and secure the rents and profits, provided these are in danger of being lost in the meantime.[6] Again, a receiver was appointed where there was danger that a tenant, who had been in possession for more than nineteen years, and had not been made a party, was contemplating setting up an adverse possession of twenty years.[7] And where, pending an appeal, the mortgagor died and the rents were misappropriated, and the property had been sold for taxes, a receiver was appointed, the security being inadequate;[8] and also, where the appeal was taken in *forma pauperis*.[9] But a

[1] Davis v. Barrett, 13 L. J. (N. S.) Ch. 304.

[2] Connelly v. Dickson, 76 Ind. 440. In this case the receivership existed during the year allowed for redemption. A contrary principle was held under a particular statute in Sheeks v. Klotz, 84 Ind. 471, where the mortgagor remained in possession. *Cf.* White v. Griggs, 54 Iowa, 650.

[3] Smith v. Tiffany, 13 Hun, 671. *Cf.* Wall Street Fire Insurance Co. v. Loud, 20 How. Pr. 95.

[4] Haas v. Chicago Building Society, 89 Ill. 498.

[5] Schreiber v. Carey, 48 Wis. 208.

[6] Oldham v. First National Bank of Wilmington, 84 N. C. 304; Warwick v. Hammell, 32 N. J. Eq. 427.

[7] Thomas v. Davies, 11 Beav. 29. *Cf.* Hackett v. Snow, 10 Ir. Eq. 220.

[8] Brinkman v. Ritzinger, 82 Ind. 358. *Cf.* Bank of Utica v. French, 3 Barb. Ch. 293.

[9] Bidwell v. Paul, 5 Baxt. (Tenn.) 693.

receiver will not be appointed pending an appeal from a final decree of foreclosure of a deed of trust, where the appointment will deprive the defendants of the statutory homestead allowance.[1] And where the property is kept in good condition and the appeal bond affords adequate security, the relief will be refused.[2]

But there is no error in continuing a receiver after a final decree, properly appointed in a foreclosure suit, upon the application of a junior mortgagee, whose debt is not due but who has filed a counterclaim setting up his demand, where he shows that the property is indivisible and the debtor is insolvent, and that the property has been sold for taxes, and is less in value than the amount of the incumbrances.[3]

Laches, acquiesence and delay on the part of the mortgagee in applying for a receiver, may, upon equitable grounds, defeat his claim to the relief, as where the mortgage has remained due for a long time before the proceedings to foreclose are commenced, and a long delay occurs between the decree of foreclosure and the sale.[4] And a receiver may be refused in a suit to redeem where there is no prayer for such relief in the bill, and the mortgagor has not been notified;[5] but the prayer for a receiver need not be made in the original bill.[6]

Where a bill to redeem was filed by one in possession, who was proved to be insolvent, on the ground that he had not been made a party to the foreclosure proceedings, an alternative order was made, upon the application of the purchaser, appointing a receiver pending the litigation, unless the complainant should elect to deliver up the possession, or give security for the rents and profits, or pay into court the mortgage money admitted to be due.[7] But where the property was ample security, and the insolvency of the complainant was denied, and he claimed possession under title, a receiver was refused.[8] Where a receiver of the rents and profits is appointed during the year allowed for redemption, the amount collected is to be paid to the party redeeming, if any, otherwise to the purchaser.[9]

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[1] Hoge v. Hollister, 8 Baxt. (Tenn.) 533. *Cf.* Callanan v. Shaw, 19 Iowa, 183, as to a receiver of a homestead, under the Iowa statute.

[2] Adair v. Wright, 16 Iowa, 385.

[3] Buchanan v. Berkshire Life Insurance Co. 96 Ind. 510. *Cf.* Washington Life Insurance Co. v. Fleischauer, 10 Hun, 117.

[4] Cone v. Combs, 5 McCrary, 651.

[5] Barlow v. Gains, 8 Beav. 329. *Cf.* Malcolm v. Montgomery, 2 Moll. 500.

[6] Connelly v. Dickson, 76 Ind. 440.

[7] Frelinghuysen v. Colden, 4 Paige, 204.

[8] Jenkins v. Hinman, 5 Paige, 309.

[9] Travelers' Ins. Co. v. Brouse, 88 Ind. 62.

Section 547. **Of the Discharge of the Receiver Upon Redemption.** — A mortgagor has an undoubted right, at any time before a sale of the property under foreclosure has been perfected, to come forward and demand that the proceedings be dismissed and a receiver, if any have been appointed, be discharged; but he must at the same time, offer to pay the mortgage debt, together with all interest and other charges unpaid, and costs. This right is an absolute one and does not depend upon an exercise of the discretion of the court.

In the opinion in the case of the Milwaukee & Minnesota Railroad Company v. Soutter,[1] the court, in deciding an appeal from an order refusing to discharge the receiver, said: "While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation is pending. But when those questions had been passed upon by the circuit court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum and have a restoration of his property by discharge of the receiver is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim; and, if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error — judicial error — which this court is bound to correct when the matter is fairly before it."

Money in the hands of a receiver, upon his discharge in this manner, belongs to the person who was in possession when the receiver was appointed.[2] And when, upon the discharge of a receiver and the discontinuance of the suit by such payment, the plaintiff's right of action is ended, and the rights of the other parties are determined.[3]

Section 548. **Seizure of Property by Receiver not Included in the Mortgage.** — A receiver becomes personally liable for taking property not included in the mortgage,[4] unless the court's order authorizes him to do so. Good faith will not protect him. Indeed, it has been held that the court cannot authorize a receiver to seize

[1] 2 Wall. 510.

[2] Paynter v. Carew, 1 Kay's Rep. appendix, xxxvi.

[3] Davis v. Duke of Marlborough, 1 Swanst. 74: s. c. 2 Id. 113; Paynter v. Carew, *supra*.

[4] Kenney v. Ranney, 96 Mich. 617.

property not included in the terms of the mortgage, and that, notwithstanding the order of the court, he is liable as a trespasser.[1]

A bank having a mortgage on certain property of a corporation began proceedings in which a receiver was appointed of "all the property of the company," some of which was not included in the mortgage. It was held that the appointment did not extend the possession of the receiver to property not included in the mortgage, which was declared to be within reach of general creditors.[2]

Where a railway company's property was mortgaged and it operated other lines in connection with its own system, the appointment of a receiver in an action to foreclose a mortgage over all the lines was held to be without jurisdiction as to the leased lines.[3]

In a proceeding to foreclose a mortgage the court has "no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor * * * make an order that will prevent, hinder or delay the other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts."[4]

The appointment of a receiver by consent of parties of all the mortgagor's property, including more than that covered by the mortgage, has been held to be fraudulent as to other creditors.[5]

II.

As Between First and Junior Mortgagees.

Section 549. **Of a Receiver for a Junior Mortgagee, the First Mortgagee Not Being in Possession, and His Rights.**— According to the strict common law theory of a mortgage the mortgagee takes an estate subject to defeat upon the payment of the principal and interest when due; in default of payment, the estate becomes absolute and the mortgagee is entitled to possession, which he may obtain either by entry or ejectment. In equity, the harshness of this rule is tempered by conferring upon the mortgagor, for a fixed time after default, the right of redemption. Accordingly, if the mortgagor has executed a second or other subsequent incumbrance,

[1] Staples v. May, 87 Cal. 178; St. Louis, Arkansas & Texas Railway Co. v. Whitaker, 68 Tex. 630.

[2] Wormser v. Merchants' National Bank, 49 Ark. 117.

[3] Hook v. Bosworth, 12 U. S. C. C. App. 208; s. c. 64 Fed. R. 443.

[4] Scott v. Farmers' Loan & Trust Co. (U. S. C. C. Ap.) 69 Fed. R. 17.

[5] Alabama National Bank v. Mary Lee Coal & Railway Co. (Ala.) 19 So. R. 404.

such later incumbrances were treated as equitable mortgages — a sort of lien cognizable only in a court of equity. This gave to the mortgagees under second mortgages, the right to call upon the chancellor for aid, whenever their security was endangered by acts or defaults, either of the elder mortgagees or the mortgagor. The rule was, therefore, well established, that, until the first mortgagee took possession, equity could interfere, in aid of subsequent incumbrancers, and appoint a receiver.[1]

At first, it was held, that this could not be done without the consent of the first mortgagee, because the court could not prevent the first mortgagee from bringing an ejectment against the receiver as soon as he was appointed.[2] But this was subsequently modified, in as much as there was no reason, if the first mortgagee had not taken possession, why the court should not appoint a receiver of the estate, the appointment being made without prejudice to his rights. If the mortgagee was not before the court in the proceeding for the appointment of the receiver, he might apply for leave to bring ejectment, which was granted as of course.[3] The only way in which the mortgagee can prevent the appointment, is by taking possession.[4]

Such a receiver, appointed at the instance of a junior mortgagee, is entitled to collect the rents and profits until some prior incumbrancer takes possession, or obtains a receiver in aid of his own suit.[5] One court will not interfere with the possession of a receiver appointed by another court having jurisdiction, if he be in actual possession of the property; and a question which is pending in one court of competent jurisdiction, cannot be raised and litigated in another court; much less can one court assume to take possession of and administer property which is in the possession of another court and in course of administration by it.[6]

The relief may be granted where the mortgagor has not been served with process and is beyond the jurisdiction of the court, where the urgency for the exercise of the power is great, although

[1] Bryan v. Cormick, 1 Cox, 422; Dalmer v. Dashwood, 2 Id. 378; Tanfield v. Irvine, 2 Russ. 149.

[2] Phipps v. Bishop of Bath, Dick. 608.

[3] Bryan v. Cormick, 1 Cox 422; Dalmer v. Dashwood, 2 Id. 378; Davis v. Duke of Marlborough, 2 Swanst. 108, 113.

[4] Silver v. Bishop of Norwich, 3 Swanst. 112, note.

[5] Washington Life Insurance Co. v. Fleischauer, 10 Hun, 117. In this case the appointment was made pending a suit to foreclose a first mortgage, to which the junior mortgagee was made a party. Howell v. Pipley, 10 Paige, 43; Post v. Dorr, 4 Edw. 413; Saunders v. Lord Lislie, Ir. Rep. 4 Eq. 43.

[6] Young v. Montgomery & Eufaula R. R. Co. 2 Woods, 606. 618.

the general rule is not to make it until the merits of the case are disclosed either by answer or default.[1]

A receiver may be appointed at the suit of a junior mortgagee to realize and apply the rents and profits to the debt secured by the first mortgage.[2]

A junior mortgagee, by consent, in an action by him, had himself appointed receiver, with power to insure and repair the buildings and to pay the ground rent and taxes. Afterward the prior mortgagee foreclosed, and the premises were sold for less than the first mortgage. The junior mortgagee, out of proceeds collected, paid ground rent, taxes and repairs. Held, on accounting, that the appointment of the same mortgagee as receiver being for his own benefit, that, having by diligence acquired a specific lien upon the rents superior to the equities of the first mortgage, he was entitled to retain them to apply on his mortgage.[3]

The appointment of a receiver in an action to foreclose a second mortgage does not preclude the appointment of a receiver to foreclose the first mortgage. To reach the mortgaged property the holder of the first mortgage must have a receiver appointed, who would supersede the other receiver.[4] It was said that the receiver appointed in the first proceeding to foreclose the second mortgage had no more right than any other person to complain that he was not appointed receiver in the action to foreclose the first mortgage.

A railroad company was composed of consolidation of several lines on which there had been given mortgages by each company. After the consolidation the consolidated company gave what was known as a consolidated mortgage on the whole system. On petition of the railroad company against the trustees of the several mortgages a receiver was appointed. The trustee of the consolidated mortgage filed a petition asking that the receiver be instructed to pay out of money then in his hands on certain overdue interest on one of the first mortgages, alleging that if such were not done foreclosure proceedings would be commenced, and confusion, delay and litigation would follow. Held that as it was not alleged that by the foreclosure of the first mortgage the system would be dismembered and its earning power destroyed, and, because it incurred

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[1] Tanfield v. Irvine, 2 Russ. 149. This case was before the high court of chancery. A contrary decision by a vice-chancellor is reported. —— v. Chadwich, 4 L. J. Ch. 67. *Cf.* Dowling v. Hudson, 14 Beav. 423.

[2] Hangan v. Nettand, 51 Minn. 552.

[3] Ranney v. Peyser, 83 N. Y. 1.

[4] Holland Trust Co. v. Consolidated Gas and Electric Light Co. 32 N. Y. S. 830.

large indebtedness in the operation of the road which it should be its first duty to secure, the petition was refused.[1]

Section 550. **Of Receivers in Foreclosures by Junior Mortgagees.** — A receiver may be appointed in a suit brought by a junior mortgagee against the mortgagor and a senior mortgagee for foreclosure, and seeking to compel such senior mortgagee to resort, in the first place, to other property held by him as security for the same debt, and such an appointment may be made on the joint application of such mortgagees.[2] And where a final decree has been obtained, a receiver may be appointed, where some third party delays the sale, pending the determination of the claims set up by such third party, provided the other conditions of insufficiency of security and insolvency, and such others as the local law requires before making an appointment, as shown to exist.[3] But the application may be refused where the rents and profits are being applied to keep down the taxes and in care of the property, and the elder incumbrancers are satisfied with the management notwithstanding that the security is inadequate.[4] And where a motion was made on behalf of certain incumbrancers in a pending suit, brought against the grantor of the incumbrance by a junior incumbrancer, that a receiver, appointed therein, should pay over to them the amount due thereon out of the rents and profits collected subsequent to the entry of the order, the motion was denied, the court saying: "The proper course for an incumbrancer to take who seeks to have a receiver already appointed extended to the payment of his incumbrance, is to file a bill for that purpose. Until an order is made extending a receiver, the incumbrancer, who has appointed the receiver, is entitled to have the rents applied in payment of his demand, irrespective of its priority, as being realized by his superior diligence, but when once the receiver is extended, then the rents must be applied according to the priorities of the incumbrances. * * * There are many cases where it is for the benefit of all parties that a receiver should pay periodical charges affecting the estate which are undoubtedly paramount * * * and where, in order to save expenses, orders have been made for payment by the receiver; but this is never done against the will of the persons at whose suit the receiver has been appointed."[5]

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[1] Cleveland, Canton & Southern Railroad Co. v. Knickerbocker Trust Co. 64 Fed. R. 623.

[2] Henshaw v. Wells, 9 Humph. (Tenn.) 568.

[3] Warwick v. Hammell, 32 N. J. Eq. 427.

[4] Myton v. Davenport 51 Iowa Eq. 583.

[5] Sanders v. Lord Lisle, Ir. Rep. 4 Eq. 43.

Section 551. **The Rule where the First Mortgagee is in Possession.**—The common law rule defining the rights of junior and senior mortgagees, where the first mortagee is in possession, was early stated by Lord Eldon, as follows: "If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then, if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but, if he is in possession, you cannot come here for a receiver; you must redeem him, and then in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance."[1]

So long as anything is due, in one case it was said, if even a sixpence is due, the receiver will be refused,[2] and the question whether anything is due cannot be tried on motion.[3] But it should clearly appear that something is due, and if the accounts of the mortagee are so incomplete that he cannot determine definitely, whether or not anything is due, the court will allow the motion to stand over in order to allow him to find out the amount, and if he fail to show any, the court may assume that nothing is due and act accordingly.[4] And where a third mortgagee took possession and retained it for many years, and received a considerable sum from the premises, and then bought up a first mortgage with a view of shutting out a second, a receiver was appointed upon the application of the second mortgagee, where such mortgagee in possession could not satisfactorily show that anything remained due on the first mortgage.[5]

But where the priority of the lien of the first mortgagee in possession is contested by other incumbrances, the court may refuse to interfere where it is not shown that he is insolvent or unable to answer for any damages in case the priority of his lien is successfully contested.[6] The appointment cannot be defeated merely by the tenant in possession showing that he has purchased part of the com-

[1] Berney v. Sewell, 1 Jac. & W. 647. *Acc.* Rowe v. Wood, 2 Id. 553; Hiles v. Moore, 15 Beav. 175; Codrington v. Parker, 16 Ves. 469; Faulkner v. Daniel, 10 L. J. (N. S.) Ch. 33; Quinn v. Brittain, 3 Edw. Ch. 314; Bolles v. Duff, 35 How. Pr. 481; Boston & Providence R. R. Co. v. New York & N. E. R. R. Co. 12 R. I. 220; Norway v. Rowe, 19 Ves. 144.

[2] Chambers v. Goldwin, cited in 18 Ves. 377. See also the cases cited in the preceding note.

[3] Rowe v. Wood, 2 Jac. & W. 553; Quinn v. Brittain, 3 Edw. Chan. 314.

[4] Codrington v. Parker, 16 Ves. 469.

[5] Hiles v. Moore, 15 Beav. 175.

[6] Trenton Banking Co. v. Woodruff, 3 N. J. Eq. 210.

plainant's mortgage, where he is in possession only of a part of the premises, the rent of which is equal to the interest he is entitled to receive upon his mortgage.[1] If the subsequent mortgagee insists on obtaining possession, he can only do so by redeeming from the mortgagee in possession — that is, by paying off the earlier incumbrance; and such a course may be necessary where the income of the premises is not applied to the reduction of the principal and interest of the mortgage debt.[2]

Section 552. **The Rule in New Jersey.**— In New Jersey it is held that, if the owner of real property assigns the rents and profits thereof for the better securing of a junior incumbrancer, the court will not aid a senior mortgagee, on a bill to foreclose, by appointing a receiver of such rents and profits.[3] This is the general rule in that state concerning the appointment of receivers in foreclosure suits. The chancellor, in the opinion, said: "I have uniformly denied applications to appoint a receiver of rents made on filing foreclosure bills. I have considered that the mortgagor is entitled to the rents while he is in possession by his tenants. I am satisfied that the contrary practice was inconsistent with what is now well understood to be the nature of the mortgage, and led to great oppression. * * * Schermier would not have been restrained from collecting the rents; and, he having assigned them to Ballentine and authorized him to collect them and apply them as payments on his mortgage, I see no reason why Ballentine should not be permitted to collect them."[4]

Section 553. **Of Receivers in Aid of Subsequent Equitable Incumbrancers.**— The general rule that a receiver will not be appointed in favor of one incumbrancer in such a way as to affect the prior rights of another, or others, applies to equitable incumbrancers and creditors, as well as to the case of mortgagees at law. A court will appoint a receiver of property in favor of equitable creditors, although a legal creditor might obtain execution against it. The appointment is always made without prejudice to prior vested rights; and where all the incumbrancers have equitable liens a reference may be directed in order to determine such priorities; if legal they are to be remitted to a court of law.[5]

But the appointment of a receiver is for the benefit of incumbran-

[1] Archdeacon v. Bowes, 8 Anstr. 752.

[2] Trenton Banking Co. v. Woodruff, *supra*; Berney v. Sewell, 1 Jac. & W. 647.

[3] Best v. Schermier, 6 N. J. Eq. 154.

[4] Best v. Schermier, 6 N. J. Eq. 154.

[5] Davis v. Duke of Marlborough, 2 Swanst. 137.

cers only as far as declared to be for their benefit, and as they choose to avail themselves of it; accordingly, a mortgagee of a term is not entitled to a retrospective account of the rents and profits in the hands of a receiver appointed in favor of others.[1]

A receiver may be appointed in the interest of annuitants whose annuities are a charge upon real property where the property is covered by mortgages, provided the mortgagees are not in possession.[2]

There cannot be two independent receiverships of the same property. Where on a judgment creditor's bill a receiver is appointed, and afterward a proceeding is commenced by the trustee of bondholders to foreclose a mortgage, in which it is sought to appoint a receiver, it was held that it is the proper practice to extend the receivership already in existence to the second foreclosure suit and that the two cases be consolidated and heard together.[3]

Section 554. **Extension of the Rule.**— The rule, under which a receiver is appointed as against a mortgagee, is not limited to such cases as have already been considered, but attempts have been made to extend the jurisdiction in favor of others than those holding either legal or equitable mortgages. Thus, pending a judgment creditor's bill, a motion was made for a receiver of certain property of the judgment debtor, which he had assigned by way of mortgage. It was charged that the mortgagee had been fully paid. This allegation was denied, and it was further pleaded in defence, that the mortgagee was solvent and able to respond if it were found that he had received more than the amount to which he was entitled. In this condition of things, the motion was denied, the court holding that it could not appoint a receiver, as against a mortgagee in possession, so long as he would swear that there was any balance due him, and, if the fact of indebtedness were contested, that it could not properly be determined upon affidavits.[4] Here it seems to have been taken for granted that a receiver would have been appointed, provided a case had been made out, just as in the case of an application by an incumbrancer.[5]

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[1] Gresley v. Adderly, 1 Swanst. 573.

[2] Dalmer v. Dashwood, 2 Cox, 378.

[3] Lloyds v. Chesapeake, Ohio & Southwestern Railroad Co. 65 Fed. R. 351.

[4] Quinn v. Brittain, 3 Edw. Ch. 314, in which the chancellor said that the mortgagee in possession is liable "to account for all rents he may receive, and for the yearly value of such parts of the premises as he himself occupies, and for all such rents as ought, with proper care and attention, to be derived from the premises and which may be lost by his negligence or improper management."

[5] *Cf.* Ryan v. Lefroy, 3 Ir. Ch. (N. S.) 351. In this case, however, a junior mortgagee being in possession, a receiver was refused.

The same ruling was made where heirs at law brought a bill against certain mortgagees in possession for an accounting, although the dissatisfaction of the incumbrancee was set up as against the application.[1]

Section 555. **Of the Right to Rents and Profits—Procedure by Prior Mortgagee.**— It is well established that a mortgagee, whether first or junior, has no right, as such, to the rents and profits of the mortgaged premises, and has no claim against any one collecting or receiving them, until he has taken possession, or has had a receiver appointed. The rule was well stated in the case of Post v. Dorr,[2] as follows: "A second or third mortgagee who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf, and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents by obtaining the appointment of a receiver of them, and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extended to his suit and for his benefit."[3]

A junior mortgagee has a right to a receiver to collect the rents of the mortgaged premises for his benefit pending a suit to foreclose, brought by a senior mortgagee, to which he is made a party.[4] And there is no error in continuing a receiver, properly appointed, in a foreclosure suit after final decree, upon the application of a junior mortgagee, whose debt is not due and who has filed a counter claim setting up his demand, where he shows that the property is indivisible and the debtor is insolvent, and that the property has been sold for taxes and is less in value than the amount of the incumbrances.[5]

If a party who has a prior incumbrance desires to obtain any benefit from a receivership granted to a junior mortgagee, the proper course for him is to file a bill to have such receivership extended

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[1] Faulkner v. Daniel, 10 L. J. (N. S.) Ch. 88.

[2] 4 Edw. Ch. 412, 414.

[3] See to same effect Howell v. Ripley, 10 Paige, 43; Washington Life Ins. Co. v. Fleischauer, 10 Hun, 117; Ranney v. Peyser, 88 N. Y. 1; Sanders v. Lord Lisle, Ir. Rep. 4 Eq. 43; Agra & Masterman's Bank v. Barry, 3 Id, 443; Lanauze v. Belfast, Holwood & Bangor Ry. Co. 3 Id. 454; Miltenberger v. Logansport R. R. Co. 106 U. S. 286.

[4] Washington Life Insurance Co. v. Fleischauer, 10 Hun, 117.

[5] Buchanan v. Berkshire Life Ins. Co. 96 Ind. 510. *Cf.* section 545, *supra*.

for his benefit.[1] In such a case, the benefit accrues to the senior incumbrancer only from the time of the extension, the rents and profits collected prior thereto go to discharge the junior incumbrance.[2] But if a junior mortgagee makes the application, in a suit brought by himself, to which prior incumbrancers are made parties, the benefit of the receivership will inure to all, unless limited in the order of appointment to the applicant.[3]

Where a senior mortgagee institutes a suit to foreclóse, making a junior mortgagee a party, and has a receiver appointed, and on the foreclosure sale, the amount realized is more than sufficient to pay off his incumbrance, the balance, and any other or further amount of rents and profits in the hands of the receiver, may be applied to the payment of the junior mortgage. In a recent New York case, speaking to this point, the court said: "The plaintiff had the fund created by the sale, as well as that derived from the rents in the hands of the receiver, to which he could resort for payment of his judgment, while the defendant was limited to the proceeds of the sale of the land. And under this principle the plaintiff could have been obliged, by a proper order for that purpose, to have exhausted the fund created by the rents before availing himself of that arising out of the sale of the land, and that would have permitted the holder of the last mortgage to have obtained complete satisfaction of his demand. Where, for any reason, the party having this right to resort to two different funds, fails to do so, as the plaintiff did in this instance, and obtains satisfaction out of the common fund, there the law will allow the party having the right against one of the funds alone, to stand in the place of the other, so far as that other may have exhausted the common fund, to be subrogated to the rights of that creditor to obtain satisfaction of his debt."[4]

It has been held, in a Tennessee case, that if a tenant takes a lease in which it is agreed that the rent shall be paid in advance, and there is a prior mortgage duly registered, and the tenent pays such rent in advance and, before the term expires, a receiver is appointed upon the application of the mortgagee he may be required to pay the rent a second time to the receiver. Such tenant, the court said, "must be held to have had notice of the mortgage, and consequently to have had a knowledge of the rights of the mortgagee, and that it was in the power of the mortgagee, at any time,

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[1] Sanders v. Lord Lislie, Ir. Rep. 4 Eq. 43.

[2] Howell v. Ripley, 10 Paige, 43; Agra, etc., Bank v. Barry, Ir. Rep. 3 Eq. 443; Lanauze v. Belfast, Holywood & Bangor Ry. Co. Ir. Rep. 3 Eq. 454.

[3] Williams v. Gerlach, 41 Ohio St. 682.

[4] Keogh v. McManus, 34 Hun, 521, 523.

to require the rent to be paid to him, and, therefore, that the mortgagor had no right to receive the rent in advance. It is the tenant's folly and misfortune, that he executed negotiable securities for the rent agreed on. He may, thereby, be required to pay the rent for this property both to the mortgagor and mortgagee."[1]

A receiver of rents and profits in a foreclosure suit has, in general, no power, without leave of the court, to expend any of the fund collected for repairs, but, it seems, a court may direct this to be done where it is necessary for the preservation of the property.[2]

Section 556. **The Rule in Virginia — Conflicting Interests.** — In Virginia a somewhat contrary rule prevails. It is there held that where there are conflicting claimants to a trust fund, who are prosecuting separate suits in the same court to subject it to their demands, the appointment of a receiver in one of the suits on the motion of the plaintiff in that suit, will inure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund. In a leading case it appeared that a debtor had executed, at different times, two deeds of trust[3] to secure certain creditors. The trustees under the second deed had notice of the first. A suit was commenced on the second, in which the trustee was appointed receiver. Before the final decree, a suit was commenced on the first deed making the receiver a party, and the question, on the appeal, was whether the receiver should be required to account for the rents and profits of the land embraced in the first deed. In as much as, in this state, the old common law rules concerning the appointment of receivers prevail — that is, that the first mortgagee is entitled to the possession, at his option after default, and if he take possession, that a subsequent incumbrancer cannot have a receiver — the court, in this case, in passing upon the controversy between the junior and senior incumbrancers, held that, where a receiver is appointed, "it is clear that the parties cannot be prejudiced, in respect of the rents and profits, by any neglect in the prosecution or defence of the suit, which would impair their rights to the principal subject out of which those rents and profits issue. During such controversy, the rents are accruing in the custody of the court, ready to be paid over to the party, ultimately

[1] Henshaw v. Wells, 9 Humph. (Tenn.) 568. The soundness of this position may well be questioned.

[2] Wyckoff v. Scofield, 103 N. Y. 630 (1887), affirming s. c. 21 J. & S. 237.

[3] It may be remarked that, in Virginia, there is no such thing as a mortgage of realty, but in lieu thereof, a would-be encumbrancer executes a deed of trust.

prevailing. In truth, from the time of the order of appointment, both parties are in possession by the hand of the receiver, and when the question of right is ultimately decided, the possession of the party prevailing becomes exclusive throughout the whole period, by relation to the date of the order. * * * It is true that a mortgagee's right to receive the profits is an incident of his possession; and if he permit the mortgagor, or subsequent incumbrancer, to retain the possession and enjoy the profits, he cannot recover them by action at law, or suit in equity. But the appointment of a receiver is in the nature of an injunction, which defeats the mortgagee's power of election; he cannot take possession if he would; the court takes and preserves it for him until his right of priority is established." The receiver was, therefore, ordered to account.[1]

[1] Beverley v. Brooke, 4 Gratt. 187, 211 (1847).

CHAPTER XVII.

RECEIVERS OF PARTNERSHIP PROPERTY.

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Section 557. **The Jurisdiction Well Established — Exercised Cautiously.**— The appointment of receivers of the property of a partnership is a branch of the general jurisdiction herein which has long been well established, and it may properly be esteemed one of

the most salutary instances of the exercise of this extraordinary power by a court of chancery, because in this way alone can the conflicting interests of contending partners be safely and fairly adjusted. When partners fail to agree, and the partnership must come to an end, if there be no amicable settlement of the accounts, the orderly procedure is for one of the partners to apply to a court of equity for a receiver.[1]

In as much as the effect of the appointment is to terminate the partnership contract by a judicial action, before the time contemplated when it was entered into, the court will act with caution, and make the appointment only when the interests of all the parties seem to warrant it. The power to make the appointment in these cases, as in others, is wholly discretionary.[2] At one time the English court held that it would exercise this power when the bill was so framed as to entitle the complainant to a decree, either enforcing the contract of partnership according to its terms, or dissolving the same;[3] but this rule is now, in practice, somewhat modified.[4]

It is also said to be the duty of a creditor, if he obtain an injunction against a partnership, to apply, at the same time, for a receiver, especially if the firm property consist partly of perishable goods.[5]

Section 558. **To Entitle a Party to the Relief the Partnership Must be Established.**—It is now settled that, upon an application for a receiver, there must be shown the due existence of a partnership, either by the admission of the defendant, or by other competent proof, as otherwise the sole property of the defendant might be taken from him, his business broken up, while in the end, it might appear that there was no right on the part of the plaintiff even to an account. The burden of proof rests, of course, upon the plaintiff.[6] If the fact of the actual existence of the partnership be

[1] Speights v. Peters, 9 Gill. 472; Jordan v. Miller, 75 Va. 442; Gridley v. Conner, 2 La. Ann. 87; Saylor v. Mockbie, 9 Iowa, 209.

[2] Madgwick v. Wimble, 6 Beav. 495; New v. Wright, 44 Miss. 202; Slemmer's Appeal, 58 Pa. St. 168.

[3] Const v. Harris, Turn. & Russ. 517, per Lord Eldon. In this case the owners of a seven-eighths interest in a theatre agreed among themselves upon a different use of the profits from that originally contemplated, and otherwise injuriously affected the interests of the other owner, who refused to join them, brought an action for the specific performance of the covenants in the original contract, and asked for a receiver.

[4] Roberts v. Eberhardt, Kay, 148; Hall v. Hall, 3 Mac. & G. 79.

[5] Osborn v. Heyer, 2 Paige, 342.

[6] Goulding v. Bain, 4 Sandf. Super. Ct. 716; Hobart v. Ballard, 31 Iowa, 521.

in doubt, and there is no allegation as to the insolvency of the defendant, or of his inability to respond in case of a recovery against him, it seems that a receiver will be refused until the partnership is clearly established.[1] And, in such a case, the court will direct an issue to be tried at law to determine the fact of partnership, and the plaintiff's interest, if any, therein.[2]

Where the order appointing a receiver states that the firm is composed of certain persons, that question is not open to dispute so long as the order remains in force, especially if it were obtained by consent.[3]

Where one purchased an interest in property and formed a partnership, but the title was not to pass until all the purchase money had been paid, it was held that he was entitled to a receiver.[4]

Section 559. **Right to Share in Profits as a Test of the Partnership in these Cases.**—As the end to be gained by the appointment of a receiver is to prevent loss to the party making the application, if he can show that the relation between himself and the defendant is such that he is entitled to participate in the profits earned, as a rule, he has a right to have a receiver, but not otherwise. Where, therefore, the plaintiff shows that he is entitled to a share of the profits, whether in addition to a fixed salary or not, it has been held that he has such an interest in the good management of the business as to justify the appointment of a receiver where he is excluded from participating in the profits, or is threatened with loss.[5] But where the contract shows that it was not the intention of the parties to form a partnership, and that the partnership was merely nominal, the plaintiff receiving a share in the profits instead of a salary, he has not such a claim on the partnership funds as will justify the appointment of a receiver.[6] The fact that the liability of a partner as to third persons has been incurred, does not vary the rule.[7]

Where one has an interest in the profits under an agreement between him and the defendant, whereby the latter was to furnish

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[1] Goulding v. Bain, *supra*.

[2] Peacock v. Peacock, 16 Ves. 49; Fairburn v. Pearson, 2 Mac. & G. 144.

[3] Russell v. White, 6 West. Rep. 148 (Mich. Sup. Ct. 1886).

[4] Taylor v. Bliley, 86 Ga. 154.

[5] Katz v. Brewington, 71 Md. 79; Katsch v. Schenck, 18 L. J. (N. S.) Ch. 386: s. c. 13 Jur. 668; Hobart v. Ballard, 31 Iowa, 521. For the general rule concerning sharing in profits as a test of partnership, see Waugh v. Carver, 2 H. Bl. 246; Cox v. Hickman, 8 H. of L. Cas. 268.

[6] Kerr v. Potter, 6 Gill, 404; Nutting v. Colt, 7 N. J. Eq. 539.

[7] Kerr v. Potter, *supra*.

the plaintiff with goods to be sold by him, and plaintiff was to make sales and collections and receive the profits and divide them equally, and brings an action to wind up the business, for an accounting and for a distribution of its assets according to the agreement, he is entitled, irrespective of any question of partnership to a receiver of the books and papers necessary to such winding up. There may be a receiver though there be no partnership; as where the plaintiff has an interest in the profits under the agreement.[1]

Section 560. **The Papers upon which the Application is made Must Show the Right to a Receiver.**—In order to give the court jurisdiction to appoint a receiver, the papers upon which the application is based, must set forth facts sufficient to show that the party making the application is entitled to the relief. Hence, as a general rule, if all the statements set up by the plaintiff are fully met and answered, or denied, the relief will be refused. But the mere denial of the existence of the partnership by the party against whom the receiver is sought, will not justify the refusal of the relief, if the court is satisfied, *aliunde*, that it does exist, especially where the person so denying is in possession of large amounts of the partnership property; the court may, in such a case, require proof of additional facts in order to determine the existence of the partnership.[2]

Where the complainant makes various charges in his bill showing *prima facie* cause for a dissolution before the stipulated time, but his allegations are so fully denied in the answer that he would fail to obtain, on the pleadings, a decree for a dissolution, he is not entitled to a receiver.[3] And where the allegations are general in their nature and are denied, the fact that the complainant might be entitled to an accounting, will not warrant the appointment of a receiver.[4]

Where the court has granted a preliminary injunction and appointed a receiver, if it be shown subsequently that the plaintiff was not entitled to the receiver, the appointment may be revoked.[5]

Section 561. **The Rule where there is No Danger of Loss.**—The object of appointing a receiver being to protect the party complaining from loss, if it appear that there is no danger of any loss,

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[1] Davidge v. Coe, 54 N. Y. Super. Ct. 360.

[2] Hottenstein v. Conrad, 9 Kan. 435.

[3] Henn v. Walsh, 2 Edw. Ch. 129; Parkhurst v. Muir, 7 N. J. Eq. 307; Codrington v. Tappan, 26 N. J. Eq. 141; Rhodes v. Lee, 32 Ga. 470.

[4] Williamson v. Monroe, 3 Cal. 383.

[5] Popper v. Scheider, 7 Abb. Pr. (N. S.) 56.

either because the complainant has possession of the property or because the respondent is able to answer for any loss, the relief will be denied. The reason for this rule is well stated by the vice-chancellor in Smith v. Lowe:[1] "There is no ground for a receiver in a case of partnership, where the partner applying has the property in his own possession. He can, as a partner, sell it. The only liability which attaches to him is that of accounting to the other partner for his share of the property, and if the latter does not object, he who has the possession ought not to complain."[2] It is well settled that a receiver will not be appointed where no danger can accrue to the property, even though the partners are not able to agree in reference to its management and control.[3] But, in New York, a receiver was appointed, although the complaint contained no prayer for one, where it appeared that one partner had enjoined the other from receiving or disposing of the joint effects, and where the latter had applied for a similar injunction without any proof of insolvency or other special cause.[4]

Section 562. **Of the Effect of Giving Security.** — If a partner be given full and adequate security against loss, there is no ground for the appointment of a receiver, in as much as the very reason for such an appointment is removed. Thus, where the firm's effects consisted of certain shares of stock, and the defendant offered to divide the stock equally and give adequate security to pay off any sum which might be established against his share, and made tender of a bond duly executed for that purpose, an order appointing a receiver was reversed upon appeal.[5] Where one of two partners made sale of the firm's assets and business to a purchaser who was solvent, and the other partner brought an action to set aside the sale and for the appointment of a receiver, and the purchaser, thereupon, offered to execute a sufficient bond to obey the orders of court and to answer any judgment which might be rendered, and it was not clear upon the hearing that the sale was fraudulent, an order for the appointment of a receiver was held to be error and was reversed on appeal.[6] And, in another case, where an injunc-

[1] 1 Edw. Ch. 33.

[2] See also Buchanan v. Comstock, 57 Barb. 568.

[3] Loomis v. McKenzie, 81 Iowa, 425; Wellman v. Harker, 8 Oregon, 520. *Cf.* Hayes v. Heyer, 4 Sandf. Ch. 485.

[4] McCracken v. Ware, 8 Sandf. Super. Ct. 416, 688.

[5] Buchanan v. Comstock, 57 Barb. 568. The court treated the application in this case as absurd, in as much as the plaintiff had had possession of the shares for a long time and his claim of ownership was not denied.

[6] Saverios v. Levy, 1 N. Y. St. Rep. 758 (Super. Ct. 1886).

tion had been granted and a receiver appointed in action to dissolve a partnership, and a motion was subsequently made to dissolve the injunction and discharge the receiver, and to permit the defendant to file security to pay to the plaintiff any sum found due him on the final settlement, the court, in view of the fact of the denial of the partnership, and that the plaintiff contributed a very small portion of the capital, if any, and that the continued existence of such orders might ruin the business, granted the motion, saying: "By the modification proposed, the plaintiff will be abundantly secured in all his rights, absolute or contingent. * * * It is thus that a court of equity molds and adapts the remedial relief it accords, so as to reach the ends of substantial justice, without compromising the rights or interest of any party to the litigation." [1]

Section 563. **What the Application Determines.**— Upon a motion for a receiver of partnership property, the court will not pass upon questions of right arising between the partners, its sole object being to protect the assets for the benefit of those ultimately entitled to them.[2]

An order appointing a receiver will not be extended so as to cover specific property alleged to belong to the partnership, where it is denied that the property is firm property and there is no evidence that it is before the court.[3] Neither will it assume to decide what is partnership property, as between the firm and third persons, but will leave that to actions by and against the receiver.[4] It will, however, determine the fact of the partnership and who are the persons composing it, in order to be in a position, under the general rule, to grant the relief. The rule, however, is otherwise on a final hearing upon the merits, at which time the rights of the partners will be settled.[5]

Where a receiver is appointed on a final decree, and is authorized to take possession of the effects of the partnership, and to reduce them to money, and to make distribution among those entitled, the fact that no bond was required will not warrant the reversal of the decree upon appeal, the parties being deemed to have waived the bond by not requiring it.[6]

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[1] Popper v. Scheider, 7 Abb. Pr. (N. S.) 56.

[2] Blakeney v. Dufaur, 15 Beav. 40.

[3] Gregory v. Gregory, 1 Sweeny (N. Y. Super. Ct.), 618.

[4] Higgins v. Bailey, 7 Robert. (N. Y.) 618.

[5] Marcy v. Grant, 48 Mich. 326.

[6] Shulte v. Hoffman, 18 Tex. 678.

Section 564. **Certain Rules Governing the Appointment.**—As a general rule the court will not grant an application for a receiver *ex parte*, but it may do so under exceptional circumstances. In general, it is deemed improper to deprive a partner of the possession of partnership property, without due notice and before service of process.[1] But, where a complaint asking for a receiver is filed, and a co-partner voluntarily appears and files his answer, without process, the regularity, or legality, of the appointment of a receiver thereupon can not be questioned collaterally in a subsequent action.[2] It has also been held, where the appointment of a receiver was refused in a suit to settle partnership affairs, and such suit was dismissed upon the motion of the plaintiff, that such action constituted no bar to a similar application in a subsequent suit, since the relief is merely ancillary, and that the dismissal, being without prejudice, constituted no hindrance to such second suit.[3] Where a receiver has been appointed and an injunction granted, the subsequent discharge of the receiver before the determination of the cause, will not affect the continuance of the injunction.[4] The fact that the court has seen fit to grant a preliminary injunction *ex parte*, will not necessitate a receiver, and the court may refuse to appoint one, leaving the injunction standing.[5]

Where an injunction and a receiver have been granted, the court can not, in the absence of a permissive statute, upon the dissolution of the injunction, award damages, but will leave the party to his independent action.[6]

Section 565. **When the Receiver may Continue the Partnership Business.**—In general, the receiver has no power to continue the partnership business. The sole reason for appointing a receiver is to preserve the partnership effects and not to supplant the partners, the province of the court being to adjust the rights and settle the disagreements of the parties growing out of the partnership transactions. Nevertheless the court will continue the

[1] McCarthy v. Peake, 18 How. Pr. 138.

[2] Pressley v. Lamb, 105 Ind. 171. In this case the appointment was made in vacation. In an earlier case in the same State it was held that a receiver would not be appointed upon the joint request of the partners without any suit pending, one partner putting his request in the form of a complaint and the other consenting in the form of an answer, because the filing and delivering of such papers to a judge would not constitute an appearance by the defendant. Pressley v. Harrison, 102 Ind. 14.

[3] Anderson v. Powell, 44 Iowa, 20.

[4] Williamson v. Wilson, 1 Bland. Ch. 428.

[5] Garretson v. Weaver, 8 Edw. Ch. 385.

[6] Sartor v. Strassheim, 8 Cal. 185.

business pending the dissolution proceeding, when it appears that by that means the good will of the partnership may be secured to the purchaser, and the full value of the business be realized by the partners. This is upon the ground that the good will is a valuable asset.[1] Acting on this principle, the court has continued the operation of a steamboat during a litigation,[2] but refused to continue the management after the boat had been run for two years, and it was proposed to continue for another year, the boat then needing considerable repairs.[3] A receiver has also been authorized to carry on a newspaper until it could be disposed of to advantage,[4] and where the paper is a political one, the partners may be allowed to conduct the editorial department.[5]

The rights of the members of a partnership to participate in the profits realized by the continuance of the business, is discussed in the case of McMahan v. McClernan.[6]

Section 566. **The General Rule Concerning the Appointment in These Cases.** — It is the well established rule, both in this country and in England, that a receiver will not be appointed of partnership property, except in such proceedings as will entitle the plaintiff ultimately to a decree for a dissolution,[7] or pending a dissolution, where the partners can not arrange the matter between themselves.[8] The question then is, what facts are necessary in order to authorize the dissolution of an existing partnership. The general proposition may be thus stated: "There must be some actual abuse of the partnership property, or of the rights of a copartner, and not a mere temptation to such abuse."[9] Mere dissatisfaction or a quarrel between the partners is not sufficient.[10]

The fact that the business is unprofitable, or that the firm should be dissolved,[11] or that one partner leaves the entire management

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[1] Jackson v. DeForest, 14 How. Pr. 81; Marten v. Van Schaick, 4 Paige, 479; Allen v. Hawley, 6 Fla. 164; Walbert v. Harris, 7 N. J. Eq. 605; Crane v. Ford, Hopk. Ch 114; Heatherton v. Hastings, 5 Hun, 459.

[2] Allen v. Hawley, 6 Fla. 164.

[3] Crane v. Ford, Hopk. Ch. 114. In this case a sale was ordered.

[4] Dayton v. Wilkes, 17 How. Pr. 510.

[5] Marten v. Van Schaick, 4 Paige, 479.

[6] 10 W. Va. 419.

[7] Goodman v. Whitcomb, 1 Jac. & W. 589; Chapman v. Beach, Id. 596; s. c. 4 Beav. 574, notes; Smith v. Jeyes, 4 Beav. 503; Henn v. Walsh, 2 Edw. Ch. 129; Garretson v. Weaver, 3 Id. 385; Jackson v. De Forest, 14 How. Pr. 81; Harding v. Grover, 18 Ves. 281; Williamson v. Wilson, 1 Bland. Ch. 418.

[8] Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Id. 479.

[9] Henn v. Walsh, 2 Edw. Ch. 129.

[10] Slemmer's Appeal, 58 Pa. St 168.

[11] Moies v. O'Neil, 23 N. J. Eq. 207; Shoemaker v. Smith, 74 Ind. 71.

and control to the other and does not interfere with him,[1] are not grounds for the appointment. Nor, as a rule, will the court interfere pending a settlement, unless a necessity is clearly shown disqualifying the partners.[2] The cases in which a receiver will be appointed herein, may be classified as follows: (*a*) Where the partner applying for the dissolution is excluded from the management or participation in the profits of the firm; (*b*) In general, in case of any material violation of the contract of partnership; (*c*) In case of fraud; (*d*) In case of dissolution by death, where the survivors mismanage the property. These cases will be considered in detail.

Section 567. **Dissolution as a Ground for a Receiver.** — It is the well settled general rule, both here and in England, that a court will not appoint a receiver of partnership property unless it appear that a decree for a dissolution will result. And, in reaching this conclusion, the court will consider both the express and implied duties arising out of the contract.[3] Frequently a receiver is appointed where, upon a dissolution, the partners can not agree upon the manner of settling the partnership affairs;[4] and this is the rule especially where the partnership had no express limitation in respect of its continuance.[5] But there has been introduced an important modification of this rule to the effect that while the circumstances of the case may justify a decree for a dissolution, this of itself will not be a sufficient reason for the appointment; there must be shown some mismanagement, or improper conduct on the part of the partners against whom the relief is sought, or some danger to the assets if left in their possession.[6]

Hence, where it does not appear that the appointment is necessary to protect the rights and interests of all the parties it will be refused, especially where the defendant protests against the exercise of the jurisdiction.[7] This limitation is founded on the right

[1] Roberts v. Eberhardt, 1 Kay, 148.

[2] Tomlinson v. Ward, 2 Conn. 396.

[3] Goodman v. Whitcomb, 1 Jac. & W. 589; Smith v. Jeyes, 4 Beav. 503; Chapman v. Beach, 1 Jac. & W. 596; Henn v. Walsh, 2 Edw. Ch. 129; Garretson v. Weaver. 3 Id. 385; Jackson v. De Forest, 14 How. Pr. 81.

[4] Van Rensselaer v. Emery, 9 How. Pr. 135. *Cf.* Martin v. Smith, 53 N. Y. Super. Ct. 277.

[5] McElvey v. Lewis, 76 N. Y. 373; Dunn v. McNaught, 88 Ga. 179; Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Id. 479.

[6] Bufkin v. Boyce, 104 Ind. 53; Harding v. Glover, 18 Ves. 281; Renton v. Chaplain, 9 N. J. Eq. 62; Wilson v. Fitchter, 10 Id. 71.

[7] Cox v. Peters, 13 N. J. Eq. 39. In this case the plaintiff had not contributed any capital, or time, and was entitled only to a share in the profits. Birdsall v. Colie, 10 N. J. Eq. 63. *Cf.* Page v. Vankirk, 1 Brewst. 290; Slemmer's Appeal, 58 Pa. St. 168.

of each partner to wind up the affairs of the partnership. In as much as a loss of the effects may result if they are left in the possession of an insolvent member, insolvency is a ground for the appointment.[1]

Section 568 **When a Receiver will be Appointed in Cases of Disagreement.** — A strong case must be presented in order to induce the court to act as against a legal title, or as against a strong presumptive title in the defendant; but where it appears *prima facie* that a fund, concerning the ownership of which a dispute has arisen, is the proceeds of some joint adventure, the court is less reluctant to act, considering it a provident exercise of its power to place such funds under the control of its officers. Thus, where one member of a partnership had in his possession and under his control a fund which appeared to be the fruit of a partnership adventure, and in which he refused to allow his co-partner to participate, so that the real ownership could not be determined until a final settlement, a receiver will be appointed or a receivership continued;[2] so, also, where there is a disagreement as to the control and disposition of the fund and as to the respective claims of the partners.[3] And where the defendant sold partnership goods, receiving as part payment certain bonds which he retained in his possession, claiming them to be his own in payment of a debt owed him by the firm, the court, in as much as he had no right to appropriate them, would not allow the claim unless it were shown that they were delivered to him with the consent of his co-partner, and compelled him to deliver the bonds to a receiver of the partnership property.[4]

But, notwithstanding that disagreements are such as to justify a dissolution and to prevent the successful conduct of the business, yet, if the appointment of a receiver to sell the effects of the partnership, would destroy the value of the business without any benefit to the partners, it may be refused.[5] A receiver may be allowed, as a matter of course, where there are dissensions and also a breach of duty, or a violation of the partnership agreement.[6]

Section 569. **Of Loss of Confidence as a Ground for the Appointment.** — The loss of that confidence which is an essential element in the formation and continuance of a partnership agreement, is an important factor to be considered in the appointment of a

[1] Randall v. Morrell, 17 N. J. Eq. 343.
[2] Speights v. Peters, 9 Gill, 472.
[3] Whitman v. Robinson, 21 Md. 30.
[4] Saylor v. Mockbie, 9 Iowa, 209.
[5] Slemmer's Appeal, 58 Pa. St. 168.
[6] Allen v. Hawley, 6 Fla. 164.

receiver, although it is seldom of itself sufficient ground. Thus, where one partner made an application for a receiver and it was admitted that the firm was insolvent, and the papers contained mutual allegations of intent to waste the joint property, and to give undue preference to certain creditors, a peculiarly fit and proper case for a receiver was presented.[1] And the same rule will apply where one partner has the entire managment of the business and is so incompetent that the firm will soon become insolvent, even though the member applying has acted in an improper manner in endeavoring to exclude him from the possession of the assets.[2]

Section 570. **When an Appointment will be made in Case of a Breach of Duty.**— A receiver is often appointed where a partner disregards the duty he owes to his co-partner, whether one implied from the relationship or expressly prescribed in the partnership agreement. Thus, where it appears that one of the partners deliberately sets about to destroy the firm's business,[3] or is carrying on a distinct business with the firm's debtors, and obliges his co-partners to refrain from calling in those debts,[4] or does not enter or account for moneys received,[5] or where several partners make a new agreement, contrary to the original one and against the wishes of others, which materially affects or varies their rights;[6] or where, by agreement, certain part-owners of a ship were made the ship's husband, and so made use of their position that they got additional profits by way of commissions.[7] And where, by the terms of the partnership articles, the business of the firm was to saw timber taken from the land of one of the members, a neglect to do so, when coupled with a failing business, was deemed a sufficient breach to justify the appointment of a receiver and the granting of an injunction.[8]

Section 571. **When an Appointment will be made in Case of Fraud.**— A court will interfere and appoint a receiver where one of

[1] Williamson v. Wilson, 1 Bland. Ch. 418. In this case the receiver was originally appointed before answer, and his power was subsequently continued. *Cf.* White v. Colfax, 33 N. Y. Super. Ct. 297; Todd v. Rich, 2 Tenn. Ch. 107; Smith v. Jeyes, 4 Beav. 503; Williams v. Wilson, 4 Sandf. Ch. 379; Sutro v. Wagner, 23 N. J. Eq. 388.

[2] Boyce v. Burchard, 21 Ga. 74.

[3] Sutro v. Wagner, 23 N. J. Eq. 388; New v. Wright, 44 Miss. 202.

[4] Estwick v. Conningsby, 1 Vern. 118.

[5] Read v. Bowers, 4 Bro. C. C. 441; Goodman v. Whitcomb, 1 Jac. & W. 573.

[6] Const v. Harris, Turn. & R. 496.

[7] Brenan v. Preston, 2 DeG. M. & G. 813. In this case where the ship's husband had removed part of the machinery for repairs, and refused to deliver it up, thus preventing the ship from meeting its engagements, the captain was made receiver.

[8] New v. Wright, 44 Miss. 202.

the partners does acts which are fraudulent as to his co-partners, in as much as it is the duty of all the partners to act with scrupulous integrity as to the others. Thus, misapplication of firm assets, such as using them for personal purposes, refusal to make a settlement, making false entries in the books, denying a co-partner access to the books, and concealing the real conditon of the affairs of the firm have been held to entitle a partner to a receiver.[1] So, also, if after dissolution, one of the partners makes such use of the partnership effects as is inconsistent with the winding up of its affairs.[2]

Section 572. **Generally of the Conditions Authorizing the Appointment.**— In a suit for the settlement of partnership accounts a receiver will not be appointed at the instance of the complainant when the defendant is in possession of all the property alleged to belong to the partnership, is entirely solvent, and denies the existe ce of the partnership.[3] After dissolution of a partnership by notice pursuant to the articles, the court will, until the sale of the business, appoint a receiver and manager for the purpose of preserving the assets by carrying into effect existing contracts and entering into such new contracts as are necessary for carrying on the business in the ordinary way.[4]

Where partners cannot agree upon a mode of closing the firm's affairs, a court of equity will appoint a receiver to close up the business.[5]

Where the proofs were doubtful as to the existence of a partnership it was held that an injunction would issue to restrain the defendant from selling or disposing of the property, but a receiver would not be appointed, when to do so would totally destroy the business so conducted under a license, which was personal to the defendant and could not be delegated, assigned or committed to the care of a receiver. "Before the court will take a step which will work such results, it must be reasonably certain that the allegations upon which relief depends are true."[6]

In an action to subject property alleged to have been bought by a debtor and title taken in his wife's name to defraud creditors, it appeared that the goods were partnership property of the wife and

[1] Barnes v. Jones, 91 Ind. 161; Haight v. Burr, 19 Md. 130; Shannon v. Wright, 60 Id. 520. *Cf.* Read v. Bowers, 4 Bro. C. C. 441; Brenan v. Preston, 2 DeG. M. & G. 813.

[2] Geortner v. Trustees of Canajoharie, 2 Barb. 625. *Cf.* Harding v. Glover, 18 Ves. 281.

[3] Irwin v. Everson, 95 Ala. 64.

[4] Taylor v. Neate, 39 Ch. D. 538.

[5] Van Rensselaer v. Emery, 9 How. Pr. 135.

[6] Semple v. Flynn, 10 Atl. R. 177.

one B., who were at least ostensible partners; that the land so conveyed to the wife was sufficient to pay the debts set forth, that the co-partners were carrying on business, selling and replenishing the stock, and that one at least was solvent. Held that the court below was justified in refusing to appoint a receiver to take charge of the property.[1] Where the partnership effects are inadequate to bear the expense of a receiver, and the defendant who has charge of them is responsible, a receiver will not be appointed at the instance of a partner.[2] Where the allegations in the bill of a partner for the dissolution of the firm failed to show insolvency of the other partners, or that they had failed to do their duty in regard to the business, or had declined to permit the plaintiff to participate in the business affairs of the partnership, it was held that there was no cause for the appointment of a receiver until final decree.[3]

Where each partner attempted to make a general assignment of the firm's property and complications arose, it was held to be a proper case for a receiver.[4]

Section 573. **Receivers in Case of the Death of One or More of the Partners.**— Co-partners being joint owners of the partnership effects, upon the death of one or more leaving some surviving, the legal title will vest in the survivors, subject to the rights of the representatives of the deceased members to an accounting. The survivors have, therefore, a right to remain in possession and wind up the firm affairs, and a court of equity will not ordinarily interfere with them. In order to justify the appointment of a receiver in such a case, there must be proof of mismanagement and improper conduct, or of danger to the partnership effects.[5] And where the survivor, for an unreasonable time, refuses to settle the partnership affairs, but continues to manage it in his own name and for his own benefit, the representatives of the deceased member are entitled to a receiver.[6] And where the survivors insist that the representatives of the deceased member shall continue the business with the funds of the estate, they will be allowed a receiver.[7] But if the survivor is a responsible person and acts in good faith, the fact that he resides abroad and manages the affairs of the firm through a competent

[1] Venable v. Smith, 4 S. E. R. 514.
[2] Rhodes v. Wilson, 19 St. R. 782.
[3] Wales v. Vennis, 9 Wash. 308.
[4] Fox v. Curtis (Pa.), 34 Atl. R. 952.
[5] Conner v. Allen, Harring. (Mich.) 371; Walker v. House, 4 Md. Ch. 39; Jacquin v. Buisson, 11 How. Pr. 394.
[6] Holden's Admr. v. McMakin, Par. Eq. Cas. 270.
[7] Madgwick v. Wimble, 6 Beav. 495. In this case the articles contained a provision allowing the representatives to come into the firm if they so elected.

agent, does not present a case for a receiver.[1] And where a dispute arises as to whether the representative is entitled to share in certain effects, such as a renewed lease, and he shows a *prima facie* title, a receiver may be appointed until the rights of the parties are determined.[2]

Section 574. **Of Exclusion as a Ground for the Appointment.**— As each member of a partnership has the right to share in the management of the firm affairs and to participate in the profits, if any there be, any material violation of this right is a sufficient breach of the contract to warrant a decree dissolving the firm and the appointment of a receiver, and it makes no difference whether the exclusion takes place while the business is in full operation or in the course of dissolution.[3] "The most prominent point on which the court acts, in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he, who assumes that power, himself enjoys."[4] Where the bill and answer set up such a state of facts as to warrant a decree for a dissolution, and it is admitted that the complainant is excluded from the premises, a receiver may be allowed;[5] but where it does not clearly and satisfactorily appear that, pending a dissolution, there is a conflict of interest and an exclusion of the complainant, a receiver will be refused in the absence of proof of mismanagement and improper conduct.[6] But partners may, by contract, provide for an exclusion in certain cases.[7]

Section 575. **Of Receivers as Against Non-Resident Partners.** — In an English case it appeared that a number of persons subscribed for shares in an association, the property of which consisted of mines, plantations and slaves in Brazil. Meetings were held occasionally, at one of which the defendant and another were appointed sole trustees and directors. Disputes having arisen the plaintiff, the owner of a certificate, filed a bill against the defendant, his co-trustee having died, for an accounting and for a division

[1] Evans v. Evans, 9 Paige, 178.

[2] Clegg v. Fishwick, 1 Mac. & G. 294; s. c. 19 L. J. (N. S.) Ch. 49; 1 Hall & T. 390; 13 Jur 993.

[3] Wilson v. Greenwood, 1 Swanst. 481; Williamson v. Wilson, 1 Bland. Ch. 418; Const. v. Harris, 1 Turn. & Russ. 496: Gowan v. Jeffries. 2 Ashm. 296; Katsch v. Schenck, 18 L. J (N. S.) Ch. 386—where there was an exclusion from profits; Kirby v. Ingersoll, 1 Doug. (Mich.) 477—an assignment case.

[4] Lord Eldon in Const. v. Harris, *supra*.

[5] Wolbert v. Harris, 7 N. J. Eq. 605.

[6] Terrell v. Goddard, 18 Ga. 664.

[7] Blakeney v. Dufaur, 15 Beav. 40.

of profits, praying for a receiver and an injunction, but not for a dissolution. Pending the motion, the defendant having clandestinely left the country and threatening to sell the property, a receiver was allowed.[1]

But in Massachusetts the court refused a receiver as against a non-resident purchaser of an interest in a firm, although a case was presented on which it would have allowed one as against a resident.[2] And, in New York, a representative of a deceased partner was refused a receiver as against a surviving partner, who resided abroad and was winding up the partnership affairs through a competent agent, he being responsible and acting in good faith.[3]

Section 576. **Of Receivers of Special or Limited Partnerships.** — A special or limited partnership is wholly a creature of statute, governed entirely by the enactment by which it is created. In New York, from the peculiar phraseology of the statute, the courts have deduced the rule that the property of such a concern is a special fund for the benefit of all the creditors, and that in case of insolvency, it is to be distributed among the creditors ratably, in proportion to the amount of their respective debts;[4] and that it then becomes the duty of the general partners to place the assets in the hands of a competent trustee for distribution equally among the creditors.[5] No creditor, after the firm becomes insolvent, can gain a preference by reason of the neglect of this duty.[6] Any creditor may file a bill in equity, on behalf of himself and the other creditors of the firm, against the co-partners to restrain them from making an inequitable disposition of the assets, and may have a receiver appointed to protect the trust fund and to distribute it among the several creditors who may come in and prove their debts under the decree.[7] The filing of a bill by one creditor and the appointment of a receiver thereunder, does not stay another creditor from filing a bill,[8] and it seems that a receiver may, in such a case, be appointed after the commencement of the suit and before answer.[9] But an assignment for the benefit of the firm's creditors, made by some of the general partners with the con-

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[1] Sheppard v. Oxenford, 1 Kay. & J. 491.

[2] Harvey v. Varney, 104 Mass. 436.

[3] Evans v. Evans, 9 Paige, 178.

[4] Innes v. Lansing, 7 Paige, 583.

[5] Jackson v. Sheldon, 9 Abb. Pr. 127. *Cf.* Lottimer v. Lord, 4 E. D. Smith, 183.

[6] Jackson v. Sheldon, *supra*.

[7] Innes v. Lansing, 7 Paige, 583; Whiteright v. Stimpson, 2 Barb. 379; Mills v. Argall, 6 Paige, 577.

[8] Innes v. Lansing, 7 Paige, 583.

[9] Bloodgood v. Clark, 4 Paige, 574.

sent of the special partner, may be set aside upon the motion of another general partner, who may be allowed a receiver thereupon.[1] And a receiver may be allowed on an accounting between the general and special partners after dissolution.[2]

Section 577. **Of the Effect of the Appointment upon the Rights of Creditors.**—It seems that the appointment of a receiver will not work the abatement of a pending suit against the company, but, otherwise, if the receiver is appointed before the suit is commenced.[3] It has been held, that the appointment of a receiver will not affect claims of creditors which have previously become liens, and that if the firm's property has been levied on under execution before such an appointment, that the levy will hold.[4] But a levy subsequent to the appointment will not prevail against the receiver's title,[5] and a partner can not, after the appointment of a receiver, give any preference to a creditor by confessing judgment.[6] A somewhat contrary doctrine prevails in California, where it is held that a creditor may obtain a preference at any time before a decree dissolving the partnership, although a receiver has been appointed in a suit for a dissolution, on the ground that until such decree is made it is not certain that sufficient reasons exist to permit the court to administer the firm's assets.[7] A purchaser of the interest of a partner subsequent to the appointment of a receiver, is not allowed to interfere with the receiver in the performance of his duties, or with property in his possession.[8]

Pending a proceeding for dissolution of partnership, till dissolution is finally declared and a receiver appointed to make a distribution among creditors, the latter are not prevented from resorting to adverse proceedings. When a creditor does so, he may gain preference over other creditors.[9]

Section 578. **Where a Receiver will be Appointed in the Interest of a Creditor.**—A receiver is often allowed to a creditor of a partnership when it appears that the business is so managed as to threaten loss. Thus, where the creditors of a partnership filed a

[1] Hayes v. Heyer, 3 Sandf. Super. Ct. 284, 293.

[2] Hogg v. Ellis, 8 How. Pr. 473.

[3] Wilson v. Wilson, 1 Barb. Ch. 592.

[4] Text approved in Hoffman v. Schoyer, 143 Ill. 598; Van Alstyne v. Cook, 25 N. Y. 489; Davenport v. Kelly, 42 N. Y. 194, and see also the chapter on Title and Possession, *supra*.

[5] Knode v. Baldridge, 73 Ind. 54.

[6] Waring v. Robinson, Hoffm. Ch. 524.

[7] Adams v. Woods, 8 Cal 152; s. c. 9 Id. 24; Naglee v. Minturn, 8 Id. 540; Adams v Haskell, 7 Id. 187.

[8] Noonan v. McNab, 30 Wis. 277.

[9] Naglee v. Minturn, 8 Cal. 540.

bill attacking a voluntary assignment by the firm, and denying the right of certain preferred creditors, on the ground that their claims were not real and *bona fide*, and that the goods had been purchased under fraudulent representations as to the solvency of the firm, that the principal preferred creditor was a near relative of the partners, and that certain mortgages, executed to the preferred creditors, were made on the eve of the assignment with a view to give color to the preferences, the court considered it a proper case to grant an injunction and to appoint a receiver until the truth of the allegations could be fully investigated.[1] So, also, where, one of the partners having died, certain creditors filed bills against the survivors for a settlement of their claims, none of the material allegations being controverted.[2] And where one of the firm retired and the remaining member assumed the debts, and a creditor filed a bill to obtain a receiver of the property of such retiring partner, the chancellor held, that the receivership should cover the partnership effects and the personal effects of the real debtor, and that the retiring partner was in the situation of a surety, and directed the application to stand over until some reason could be shown for limiting it to the property of the retiring member.[3] A creditor, having a lien on partnership property, is entitled to an injunction restraining the disposition of the property and to a receiver.[4]

Section 579. **Of an Assignment by One Partner as a Ground for the Appointment.** — The interest of each partner in the partnership property is subject to the lien of the other partners if they have made payments beyond their proportion of the indebtedness, and it is applicable to the payment of such indebtedness before any division of the partnership property. Hence, if any members of a firm attempt, by an individual assignment, to give a preference to their own personal creditors, the remaining members are entitled to a receiver of the partnership effects pending a dissolution. Thus, where a firm, doing business in Havana, contracted with another firm in New York to purchase sugars and to ship them on their joint account consigned to the latter, and were to draw drafts on the consignees to pay for the sugar, it was held, that the two firms constituted a co-partnership and that an assignment by the New York house for the benefit of their creditors only carried their residuary interest, and that the court would restrain, by injunction if neces-

[1] Oliver v. Victor, 74 Ga. 543.
[2] Dick v. Laird, 4 Cranch, C. C. 667.
[3] Henry v. Henry, 10 Paige, 314.
[4] Greenwood v. Brodhead, 8 Barb. 593.

sary, the application by the assignee of the joint assets to the payment of the debts of the New York house, and would grant a receiver, in the event of an attempt to make such appropriation, which would extend to all the partnership assets in the hands of the New York partners, and would direct a reference to ascertain the amount of such assets.[1]

It seems, also, that the court will appoint a receiver of the effects of a partnership, upon the application of such an assignee, if the remaining partners seek to exclude him from his share in the business.[2] And where a partner makes an assignment of the firm's assets with the apparent purpose of excluding his partner from acting pending a settlement, and the effect of such assignment is to deprive him of the right to inspect the books and to look after the property, the excluded member is entitled to a receiver, who shall take possession of all the partnership property, including the interest of the assignor.[3] But a receiver was refused where it did not appear that the assignee was fully responsible and the funds insecure, when the application was made on the ground of the invalidity of the assignment.[4]

Section 580. **When a Receiver will be Appointed in Case of a Sale.** — A sale or assignment of his interest in a partnership by one of the partners, operates as a dissolution of the firm, and thereupon the remaining members have a right to settle up the business and distribute the assets. The courts will not, as a rule, interfere with them in so doing, and the purchaser as such is not entitled to a receiver.

But if such remaining partners act fraudulently or dishonestly, a receiver may be allowed, but even then the relief may be refused if they are able to respond in damages.[5] And if the remaining partner excludes the purchaser and denies both his rights and those of his vendor, and sets up an adverse title, a receiver will be granted.[6]

Where, by the terms of a partnership agreement, the partners were to contribute equally to the capital and to share the profits and losses equally, and one contributed only a small proportion of his share and refused to pay the remainder, but sold his interest in the firm and its property, without the knowledge or consent of his

[1] Davis v. Grove, 2 Robert. (N. Y.) 134, 635.

[2] Wilson v. Greenwood, 1 Swanst. 482, 483 (by Lord Eldon).

[3] Kirby v. Ingersoll, 1 Doug. (Mich.) 477; Rutter v. Tallis, 5 Sandf. Super. Ct. 610; Candler v. Candler, Jac. 225.

[4] Hayes v. Heyer, 4 Sandf. Ch. 485; s. c. 3 Sandf. Super. Ct. 284.

[5] Renton v. Chaplain, 9 N. J. Eq. 62.

[6] Seibert v. Seibert, 1 Brewst. 531.

bill attacking a voluntary assignment by the firm, and denying the right of certain preferred creditors, on the ground that their claims were not real and *bona fide*, and that the goods had been purchased under fraudulent representations as to the solvency of the firm, that the principal preferred creditor was a near relative of the partners, and that certain mortgages, executed to the preferred creditors, were made on the eve of the assignment with a view to give color to the preferences, the court considered it a proper case to grant an injunction and to appoint a receiver until the truth of the allegations could be fully investigated.[1] So, also, where, one of the partners having died, certain creditors filed bills against the survivors for a settlement of their claims, none of the material allegations being controverted.[2] And where one of the firm retired and the remaining member assumed the debts, and a creditor filed a bill to obtain a receiver of the property of such retiring partner, the chancellor held, that the receivership should cover the partnership effects and the personal effects of the real debtor, and that the retiring partner was in the situation of a surety, and directed the application to stand over until some reason could be shown for limiting it to the property of the retiring member.[3] A creditor, having a lien on partnership property, is entitled to an injunction restraining the disposition of the property and to a receiver.[4]

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[1] Davis v. Grove, 2 Robert. (N. Y.) 134, 635.

[2] Wilson v. Greenwood, 1 Swanst. 482, 483 (by Lord Eldon).

[3] Kirby v. Ingersoll, 1 Doug. (Mich.) 477; Rutter v. Tallis, 5 Sandf. Super. Ct. 610; Candler v. Candler, Jac. 225.

[4] Hayes v. Heyer, 4 Sandf. Ch. 485; s. c. 3 Sandf. Super. Ct. 284.

[5] Renton v. Chaplain, 9 N. J. Eq. 62.

[6] Seibert v. Seibert, 1 Brewst. 531.

co-partner, and the transferee claimed to hold his proportionate part free and discharged of all firm debts and liabilities, and threatened to exclude the continuing partner from the firm property and to use it for his own benefit, all this coupled with the insolvency of his transferor and his own irresponsibility, makes out a sufficient case for a receiver.[1] And where all the members composing a partnership sold their interests to various purchasers, some of whom obtained possession and refused to allow the others to share therein and were insolvent, a receiver was allowed to the excluded purchasers.[2] But, in as much as the action did not involve an accounting, a receiver was refused to a purchaser of the interest of a partner, who brought an action against the vendee of a judgment creditor to recover his interest, upon the ground that the creditor had fraudulently acquired the partnership property under an execution sale founded on a judgment recovered in an action to which the other partner had not been made a party, and sought to have the sale set aside, the property sold, and his share paid him out of the proceeds.[3]

Where, pending proceedings to secure the appointment of a receiver of partnership assets, one of the partners made an assignment of his individual property, the court, upon the petition of a receiver subsequently appointed, required such partner and his assignee to convey the realty and to transfer the personalty so assigned, to the receiver.[4] But where funds in the hands of a receiver of partnership property are conceded to be the individual assets of one partner, such partner may make a separate assignment thereof.[5]

An order of a court authorizing its receiver to file proofs of all the claims of a firm's creditors in another court which had appointed an assignee of the individual property of one of the partners, and to receive from such assignee the surplus of the individual estate, is not binding either on the assignee or the other court.[6]

Section 581. **When a Receiver will be Appointed in the Interest of a Retiring Partner.** — Where articles of dissolution are drawn up between the persons composing a partnership, whereby certain partners to whom the entire partnership property is transferred, are authorized and directed to collect the debts due to the firm and to

[1] Heathcot v. Ravenscroft, 6 N. J. Eq. 118.

[2] Maynard v. Railey, 2 Nev. 313.

[3] Morrison v. Benthuysen, 9 North East. Rep. 180; s. c 5 Cent. Rep. 43.

[4] Arnold v. Providence Lumber Co. 1 New Eng. Rep. 44 (Sup. Ct. R. I. 1886). This was under a statute.

[5] Weinrich v. Koelling, 8 West. Rep. 439 (Mo.)

[6] Wallace v. Milligan, 11 North East. Rep. 599 (Sup. Ct. Ind. 1887).

assume the debts due by the firm, and to allow the retiring partner free access to the accounts, such partner has an equity to enforce those covenants and to compel the remaining partners to pay the firm's liabilities out of the firm property. Under these circumstances no very strong case of breach of contract or other misconduct will be necessary to move the court to interfere in behalf of a partner; but the courts, upon the general principles of equity jurisprudence, will hold those having the legal title and exclusive custody of the partnership effects to a strict accountability and to an honest performance of their duty.

In such a case, where the remaining partners extended the time for the payment of the firm debts beyond the time of the dissolution and refused the retiring member access to the books of account, and feelings of bitter enmity had taken the place of those of friendliness, it was said a court would appoint a receiver, or would continue one already appointed where the original causes had been removed, and would not leave the retiring member to a new application.[1] But where the liquidation of a firm was placed in the hands of one of the members with the understanding that he was not to be disturbed for a certain unexpired period, and he had performed all his duties faithfully, a receiver was refused,[2] and where two of the partners are appointed joint receivers by stipulation, disagreements arising from incompatibility of temper and conflicting interests, are not sufficient to relieve one of them from the obligation of the agreement.[3] And where, upon a dissolution, a retiring partner transfers his interest to the remaining partners on condition that they assume all the firm indebtedness and agree to hold him harmless, such an agreement does not release him as to the firm's creditors, but he assumes a position of surety as to the remaining partners.

Where they act in violation of the terms of the agreement, as, by sending the firm's money beyond the state, or are otherwise wasting and misapplying the funds, or where the retiring partner is sued for the firm's debts, or there is danger of such suits by reason of the insolvency of the remaining partners, the court may appoint a receiver of the firm's assets upon the application of the retiring partners.[4]

Where the remaining partners are able to respond in damages, and no danger is shown, the relief will be denied;[5] but a receiver

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[1] White v. Colfax, 33 N. Y. Super. Ct. (1 J. & S.) 297.

[2] Weston v. Watts, 1 New York State Rep. 763 (1886).

[3] Conner v. Belden, 8 Daly, 257.

[4] West v. Chasten, 12 Fla. 315; Drury v. Roberts, 2 Md. Ch. 157; *Cf.* Butchart v. Dresser, 4 DeG. M. & G. 543.

[5] Simon v. Schloss, 48 Mich. 233.

will be appointed where the business is continued by the remaining partners, if they make use of the assets of the old firm.[1] And where, under articles of dissolution, the remaining partners form a new firm for the continuance of the business, and the retiring partner is held liable on some of the firm's debts, he has the same remedy against a subsequently appointed receiver of the assets of the new firm as he would have had against the the individual members themselves.[2] The fact that a continuing partner makes a general assignment, without preference, for the benefit of the firm's creditors, is not a ground, irrespective of the question of the validity of the assignment, for the appointment of a receiver upon the retiring partner's application, where there is no charge that the assignee is not fully responsible, and where there is no reason to believe that the funds in his hands are insecure.[3]

Where a partner has exercised his right to dissolve a firm, a receiver will be appointed, as of course, where the partners cannot arrange the settlement among themselves, notwithstanding the general rule, that each partner has an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the firm's debts. Such a receiver should pay the liabilities ratably without preferences.[4]

Section 582. **When a Receiver will be Appointed in the Interest of the Representatives of a Deceased Partner.** — It is settled law that, as a general rule, the surviving partner has a right to settle the affairs of a firm dissolved by the death of one of the members, and that the executor or administrator of a deceased member has no other right in the premises than that of calling the survivor to an account. But, nevertheless, the personal representative has, in general, the same right to a receiver that one of the partners has or would have had.[5] Accordingly, where there is unreasonable delay in closing up the affairs of the partnership, or the survivors are wasting its effects,[6] or confidence has been destroyed by mismanagement, or improper conduct,[7] or the survivors insist on continuing the business with the assets of the deceased partner,[8] the

[1] Harding v. Glover, 18 Ves. 281; Wilson v. Greenwood, 1 Swanst. 483.
[2] Allyn v. Boorman, 30 Wis. 684.
[3] Hayes v. Heyer, 4 Sandf. Ch. 485; s. c. 3 Sandf. Super. Ct. 284.
[4] Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Id. 479; Dunn v. McNaught, 38 Ga. 179.
[5] Collyer on Partnership, 197.
[6] Miller v. Jones, 39 Ill. 54.
[7] Walker v. House, 4 Md. Ch. Dec. 39; Jacquin v. Buisson, 11 How. Pr. 394.
[8] Madgwick v. Wimble, 6 Beav. 495.

personal representatives not only have a right to interfere by applying for a receiver, but it may even become their duty to do so.[1]

A court will appoint a receiver, as of course, where all the partners are dead and a suit is pending between their respective representatives for an accounting, upon the ground that the confidence which subsists between partners, or between the survivor and the representatives of a deceased partner, does not necessarily subsist between their representatives.[2]

Section 583. **When a Receiver will be Appointed in the Interest of a Legatee.** — In an English case, a receiver was allowed to the legatee of a deceased partner, upon a bill for a dissolution, where the business had been continued for several years by such legatee and the survivor, and he had received a share in the profits, and where his right was denied by the other partner, who claimed all the partnership assets upon the ground that the legatee, being a clergyman, was prohibited, by act of parliament, from engaging in such secular business or avocation.[3]

Section 584. **A Partner may be Appointed Receiver.**— According to the practice in England, each partner has the privilege of proposing himself as receiver of the partnership effects,[4] and this practice has been followed to a greater or less extent in this country.[5] But, as a general rule, when a partner is appointed, it is by stipulation, or agreement among the partners themselves or in connection with the creditors.[6] While a partner has no legal claim to be appointed, he is to be preferred if his capacity and integrity are unquestioned and he can give the necessary security.[7] Thus, if a firm is dissolved through the insolvency of some of its members, the solvent member cannot insist that his legal rights are the same as those of a surviving partner and so claim the sole administration of the assets.[8]

When a partner acts as a receiver, he is not entitled to any com-

[1] Clegg v. Fishwick, 1 Mac. & G. 294; Miller v. Jones, *supra*, where it is held that the personal representative, if not otherwise disqualified, may be appointed receiver.

[2] Phillips v. Atkinson, 2 Bro. C. C. 272.

[3] Hale v. Hale, 4 Beav. 369.

[4] Sargent v. Read, 1 Ch. D. 600; Blakeney v. Dufaur, 15 Beav. 40; Jeffreys v. Smith, 1 Jac. & W. 302.

[5] Brien v. Harriman, 1 Tenn. Ch. 467; Kirkpatrick v. Corning, 38 N. J. Eq. 234; Gridley v. Conner, 2 La. Ann. 87; McMahon v. McClernan, 10 W. Va. 419.

[6] Conner v. Belden, 8 Daly, 257; Todd v. Rich, 2 Tenn. Ch. 107.

[7] Hubbard v. Guild, 2 Duer, 685. *Cf.*, however, Ogden v. Arnot, 29 Hun, 146.

[8] Hubbard v. Guild, 2 Duer, 685.

pensation, and must give the same security that would be required of any other person,[1] and where a partner is appointed receiver, he ceases to occupy the position or relation of a partner, but becomes an officer of the court appointing him, and he is responsible as such.[2] If he use the partnership funds for his personal profit, he is not liable to his co-partners as a partner, but is accountable primarily to the court.[3]

Section 585. **Of the Title of a Receiver of Partnership Property.**— Upon the appointment of a receiver, the entire legal and equitable title to the tangible property of the firm, as well as to its rights and remedies, vest in him.[4] And real property, held by the members of a firm as tenants in common, but used for partnership purposes and built on with partnership funds, will be treated as partnership property, and will pass to the receiver.[5] But where the order directed the partners to convey the property to a receiver, no title will vest in him until the conveyance is executed.[6] And where a firm is dissolved by the insolvency of one member, and the solvent member, in closing up the business, executes a chattel mortgage to a creditor to secure a debt, a temporary receiver appointed has not such a title as will authorize him to bring an action against such creditor to recover goods taken under the mortgage.[7]

Where a partner was appointed receiver, and subsequently a suit was commenced to foreclose a mortgage given by the firm, to which such partner was made a party as partner but not as receiver, it was held that a receiver, appointed to succeed him, could not redeem from the sale upon that ground, no objection having been made at the time.[8] It is no defence to a suit by a receiver to foreclose a vendor's lien on real property sold by him, that one partner had not been made a party to the proceeding in which he was appointed, it not being shown that such co-partner was alive at the time, or was within the jurisdiction of the court, or had a substantial interest in the business.[9] A receiver of the individual effects of a partner has

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[1] Sargent v. Read, L. R. 1 Chan. Div. 600; Blakeney v. Dufaur, 15 Beav. 40; Brien v. Harriman, 1 Tenn. Ch. 467; Todd v. Rich, 2 Tenn. Ch. 107; Hubbard v. Guild, 2 Duer, 685.

[2] Blakeney v. Dufaur, 15 Beav. 40; Gridley v. Conner, 2 La. Ann. 87.

[3] Whiteside v. Lafferty, 3 Humph. (Tenn.) 150.

[4] Tillinghast v. Champlin, 4 R. I. 173; Wallace v. Yeager, 4 Phila. 251; Pearce v. Gamble, 72 Ala. 341.

[5] Smith v. Danvers, 5 Sandf. Super. Ct. 669.

[6] Fincke v. Funke, 25 Hun, 616.

[7] Ogden v. Arnot, 29 Hun, 146.

[8] Kirkpatrick v. Corning, 38 N. J. Eq. 234.

[9] Stelzer v. La Rose, 79 Ind. 435.

no right to interfere with, or to dispose of his interest in the firm property, and if he does he may be required to make restitution, in as much as his appointment does not affect the co-partner's title to the firm property.[1]

Section 586. **Of the Duties and Powers of Receivers Herein.** —The first and principal duty of a receiver in these cases is, as in general in other cases, to collect and reduce to available funds the debts and effects of the partnership,[2] and the partners may be compelled, upon his motion, to pay over collections made by them prior to his appointment.[3] Under a statute in Rhode Island, if a member of a partnership makes an assignment of his individual property pending proceedings against the partnership for a receiver, a petition by the receiver, when appointed, for an order requiring such partner and his assignee to join in a conveyance to him of the assigned realty and to transfer to him the personalty, will be granted.[4] The receiver may be required to pay over to the partner, upon whose application he was appointed, the proportion of the collections to which he is entitled.[5] A receiver, of a partnership dissolved by the death of one of the members, appointed at the instance of the representative of the deceased member, is clothed with all the rights and equities of such partner and stands in the place both of him and of his representative as far as the winding up of the business is concerned.[6] And, it has been held, that the appointment of a receiver by a court having jurisdiction of a suit instituted to settle the partnership affairs, is sufficient authority to the receiver to sue for debts due to the firm, although in the meanwhile one of the partners dies and letters are issued upon his estate.[7] Such a receiver supersedes the surviving partner in the possession and control of the partnership effects, and in the authority to settle the partnership affairs. He is, therefore, a necessary party to all suits to collect the firm debts, and a judgment recovered against the survivor after the appointment is a nullity.[8]

[1] Hamil v. Hamil, 27 Md. 679. In this case the receiver was appointed upon the application of a wife in a suit for a divorce, the husband having absconded.

[2] Jackson v. DeForest, 14 How. Pr. 81.

[3] Murphy v. DuBerg, 11 Abb. N. C. 112. In this case the receiver was appointed upon the application of one of the partners, who was then required to pay to the receiver collections made by him just prior to his appointment

[4] Arnold v. Providence Lumber Co. (Sup. Ct. R. I.) 1 New Eng. Rep. 44.

[5] Maher v. Bull, 44 Ill. 97.

[6] Tillinghast v. Champlin, 4 R. I. 173.

[7] Helme v. Littlejohn, 12 La. Ann. 298. *Cf.* Martin v. Smith, 53 N. Y. Super. Ct. 277.

[8] Kirkpatrick v. McElroy, 41 N. J. Eq. 539; s. c. 7 Atl. Rep. 647, 5 Cent. Rep. 67 (1886).

Funds in the hands of a receiver are not liable to attachment or garnishment, because, being under the control of the court, they can be disposed only by order of court.[1]

A power not possessed by a partner can not be conferred by the court on the receiver.[2]

Section 587. **Of the Conduct of the Business by the Receiver.**—Although a receiver has been irregularly appointed, if the appointment has been acquiesced in, he will be protected as long as he acts in good faith; and a receiver so appointed may appoint a competent person to take charge of the business, or a reasonable number of keepers to preserve the property, but he can not, except by special order, appoint a deputy receiver or counsel.[3]

A receiver may, by the order of his appointment, be directed to act personally in the business, to collect the debts and pay tax-duties and other charges, and to sue in the name of the partners.[4] It is improper to enjoin a receiver from taking possession of the property, as such action is, in effect, to restrain the court from making a proper disposition of the funds which may come into its receiver's hands.[5] But the receiver may be required to produce the books of account of the firm's business kept by him, for examination before a master. An inspection, however, can not be directed on the receiver's premises.[6]

Section 588. **Of Sales by the Receiver.**—Where the court has taken possession of property in litigation and has continued its use for a considerable period, it may, at any time, refuse to go on with the business, on account of the inconvenience and unfitness of such a proceeding, and direct a sale.[7] If the court has jurisdiction of the members of the partnership, it is sometimes held the receiver acquires title to property without the territorial jurisdiction of the court, also to choses in actions and book accounts due from persons

[1] Receiver of Adams & Co. v. Roman (unreported), cited by Terry, J., in Adams v. Hackett, 7 Cal. 187.

[2] Niemann v. Neimann, 43 Ch. D. 198.

[3] Corey v. Long, 12 Abb. Pr. (N. S.) 427.

[4] Skip v. Harwood, Dick. 114; s. c. 8 Atk. 564.

[5] Van Rensselaer v. Emery, 9 How. Pr. 135.

[6] Maund v. Allies, 4 Myl. & Cr. 503.

[7] Crane v. Ford, Hopkins Ch. 114. In this case it appears that the chancellor ordered the sale of a ship which had been navigated for two years by the receiver, but which was then in need of material repairs—and this, although the bill was not framed for that purpose, and had been taken *pro confesso* against some of the defendants—upon the theory that the power to sell was incident.

without the jurisdiction, and that a purchaser from the receiver acquires a good title and is not accountable to the firm, or to the individual members thereof, for the proceeds.[1]

It is often a dictate of sound business policy on the part of the court to direct a sale of partnership property. Thus, where the partners were conducting an insane hospital and immigrant lazaretto, and the business was broken up by disagreements and cross-suits, the court, in order to preserve the good will of the establishment, appointed a receiver with directions to sell the lease of the premises occupied and the moveables and good will and restrained the parties except those who might purchase, from conducting the same business, directly or indirectly, in the city.[2] But where the proceedings, in which the receiver is appointed, are instituted in an inferior court, it is improper, while there is an appeal pending to settle a question of jurisdiction, for such lower court to direct a sale.[3]

Failure of receiver to sell the good will of the partnership will subject him to account for its value.[4]

A receiver of a partnership has the right, under a license to the firm, to sell patented stoves, remaining on hand, in the winding up of the affairs of the partnership, and an application for an injunction against the receiver will be denied.[5]

Section 589. **Of Payments by the Receiver.**—A receiver appointed to take charge of a partnership estate has no power to transfer to a firm creditor a secured note not included in the inventory, in satisfaction of the firm's indebtedness to him; and in general, no discretion is allowed him as to the application of the funds.[6] But, on the other hand, it has been held, in Louisiana, to be error for the court, upon a rule against a receiver to show cause why he should not pay certain moneys into court, to reject testimony that he had used the money to pay the debts justly due, in as much as such a disposition would be a complete answer to the rule.[7] And where a member of a partnership kept certain funds on deposit with another firm, consignees of his firm, sufficient to secure advances, it was held that such deposit simply made him a creditor of the consignee, and that he had no legal or equitable lien

[1] Loney v. Penniman, 43 Md. 130.

[2] Williams v. Wilson, 4 Sandf. Ch. 379.

[3] McNab v. Noonan, 28 Wis. 434. See also s. c. *sub. nom.*, Noonan v. McNab, 30 Id. 277.

[4] Mechanics' National Bank v. Landauer, 68 Wis. 44.

[5] Montross v. Mabie, 30 Fed. R. 234.

[6] Hospes v. Almstedt, 13 Mo. App. 270.

[7] Kellar v. Williams, 3 Rob. (La.) 321.

upon any property in the hands of a receiver of the consignees. The court, therefore, properly refused a motion to require the receiver to pay over the balance claimed to be due.[1]

Where one of the partners is appointed receiver and, as such, makes collections, he has no right to withhold them upon the ground that they are due him personally, in as much as such an act would be in violation of his trust.[2]

[1] Butler v. Sprague, 66 N. Y. 392, where it appears that the depositor had drawn drafts and made deposits, and statements of accounts had been made to him from time to time, in which he was allowed interest on credits and charged interest on debts.

[2] Gridley v. Connor, 2 La. Ann. 87, where it appeared that the moneys collected had been mingled with partnership funds.

CHAPTER XVIII.

RECEIVERS OF TRUST PROPERTY.

Section 590. Receivers in Cases of Express Trusts — When Appointed.
591. Receivers in Cases of Trusts Created by Will.
592. Receivers in Cases of Trusts Created by the Legislature.
593. Receivers *Pendente lite.*
594. Receivers Pending Litigation Over Probate.
595. Receivers in Actions to Set Aside Sales.
596. Receivers as Against Executors and Administrators.
597. What will Constitute Ground for the Relief.
598. Receivers in Behalf of Infants as Against Adverse Holders.
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600. Of the Poverty or Insolvency of the Trustee as a Ground.
601. Receivers in Cases of Joint Trustees.
602. Of the Effect of the Removal of the Trustees Beyond the Jurisdiction of the Court.
603. Receivers in Cases of Foreign Trustees.
604. Receivers in Aid of Creditors.
605. Receivers in Aid of Sureties.
606. Of the Selection of a Receiver in These Cases.
607. Of the Effect of the Appointment of a Receiver Herein.
608. Of the Discharge and Removal of the Receiver.

Section 590. **Receivers in Cases of Express Trusts — When Appointed.** — In this chapter will be found a consideration of such cases as seem to fall most appropriately, in a logical subdivision, to the title of receiverships in cases of trusts. But the careful reader will not have failed to observe that, throughout the work hitherto, a comparatively large number of cases have been cited and digested under other titles which have involved a receivership of trust property. When such cases have seemed to belong more properly elsewhere they have been included in other chapters, and such cases only have been assigned to this chapter as have seemed to illustrate or elucidate some phase or other of the subject as specially modified by the consideration that the property of which the receiver was appointed was property affected by a trust.

It may be remarked, in the first place, that courts of equity no more incline to exercise their power of appointing receivers in cases where they have exclusive jurisdiction than in other cases. Accordingly, it is generally held that there must appear the same substantial grounds for the exercise of the jurisdiction in these cases as in those in which the cause of action is one peculiarly at law.

This is especially the rule in the case of express trusts, on account of the confidence reposed by the donor in the trustee. The general ground upon which a receiver is appointed in this class of cases, is that the trust estate is in danger because of the waste, misconduct or mismanagement of the trustee.[1] A receiver will not be allowed simply because the appointment can do no harm;[2] and, if the trustees consent to pay the income and profits into court, no appointment will be made.[3] Thus, where, in a suit to have the trust declared, the trustee denied the trust, which was subsequently established to the satisfaction of the court, it was deemed a proper case for the appointment of a receiver.[4] So, also, where property is bequeathed in trust, to have the income applied to the support of certain *cestue que trusts*, without power in the trustee to sell or mortgage, if the trustee neglect his duty to pay the taxes, so that, in consequence, the property is sold at a judicial sale, a receiver will be appointed and empowered by the order to mortgage enough of the estate to raise money to redeem the whole from the sale.[5] And where there was no covenant in a deed of trust upon the part of the trustee to perform his duties, a receiver was allowed upon his non-performance;[6] likewise, where property had been bequeathed to a wife upon the faith of a promise that she would dispose of it in a certain way, and she failed to do so.[7] And where the trustee of a government pension refuses to pay the pension, and then removes himself beyond the jurisdiction of the court, a receiver is the proper relief.[8]

A receiver will be appointed of an estate, the corpus of which belongs to certain children and the income to their mother, where the husband and trustee has, with the approbation of his wife, managed the property and incurred an indebtedness for supplies, partly for the betterment of the property and partly for the individual benefit of the annuitant, so that part of the future net income may be applied, year by year, to the payment of the accumulated balances due creditors.[9] And where, by a marriage settlement, certain stocks and estates were conveyed to trustees for the benefit of

[1] Willis v. Corlies, 2 Edw. Ch. 281; Hatcher v. Massey, 66 Ga. 66; Boyd v. Murray, 3 Johns. Ch. 48; Jenkins v. Jenkins, 1 Paige, 243.

[2] Rogers v. Ross, 4 Johns. Ch. 388.

[3] Prebble v. Boghurst, 1 Swanst. 309.

[4] McCandless v. Warner, 26 W. Va. 754.

[5] Burroughs v. Gaither, 5 Cent. Rep. (Md. 1886), 596.

[6] Taylor v. Emerson 4 Dr. & W. 117.

[7] Podmore v. Gunning, 5 Sim. 435 — where the appointment was made on the bill and affidavits.

[8] Noad v. Backhouse, 2 Younge & C. Ch. 529.

[9] Robert v. Tift, 60 Ga 566.

a wife for life with remainder to her children, and she fraudulently obtained a transfer of the stock and sold it, and assigned her life interest in the land together with a rent charged on other estates, to one who had notice of the fraud, a receiver of such rent charge and of the rents of the trust estate was appointed, and he was directed to apply the same to replace the stock.[1] But where a husband induced certain trustees, who held moneys, under a marriage settlement, for the separate use of the wife without power of anticipation, to purchase property, in violation of their trust, for a lease of which he had contracted, and he then laid out large amounts of money in buildings and repairs thereon, when trustees commenced a proceeding at law to enforce their right to the rents, the husband filing a bill setting up his lease and asking for a sale and for the application of the proceeds to replace the trust funds and to reimburse his outlays, a receiver was refused.[2] And the court will not displace a trustee upon the application of one of the several beneficiaries, merely for the reason that the estate has depreciated in value and the incumbrances thereupon have increased, unless the management of the trustee has been improper;[3] so, also, where the beneficiary claimed to hold the fund absolutely instead of in trust, a receiver in her behalf ought not to be allowed, because it would be an unauthorized division of the trust.[4] And in a suit to set aside an assignment for the benefit of creditors upon the ground of fraud, a receiver will be refused where the fraud is denied and the trustee is able to respond in damages.[5] But where the trustee is irresponsible and the plaintiff is likely to be successful, if there be reasonable ground to apprehend loss by reason of the fraudulent disposal of the property before the determination of the litigation, the rule would be unwise.[6]

A receiver of choses in action will not be appointed in an attachment suit against a foreign corporation, where the corporation is in the hands of trustees in the state of its residence.[7]

Section 591. **Receivers in Cases of Trusts Created by Will.**— Where claims to real estate under a will have been determined, and

[1] Woodyatt v. Gresley, 8 Sim 180.

[2] Wiles v. Cooper, 9 Beav. 294.

[3] Barkley v. Lord Reay, 2 Hare, 306.

[4] Richards v. Barrett, 5 Brad. 510. The opinion in this case contains a dictum to the effect that, if the trustee should mismanage the fund or become insolvent so as to endanger it, the court would remove him and appoint a new trustee.

[5] Levenson v. Elson. 88 N. C. 182. *Cf* Fairbairn v. Fisher, 4 Jones Ex. 390.

[6] Ellett v. Newman, 92 N. C. 519.

[7] Fenton v. Lumberman's Bank, 1 Clarke Ch. 286.

the rents and profits thereof are in the hands of trustees, a receiver of such rents and profits may be appointed where there is necessary delay in the execution of the trusts under the will.[1] And it is proper to appoint a receiver, in an action to have the trusts under a will remaining unperformed carried into execution by the court, where the income of the property has not been properly expended in caring for it.[2]

Where a trust devolves upon the court of chancery, on account of the death of one of the trustees named in a will and the refusal of the others to act, a proper case is presented, if there be a suit pending to test the validity of the will, to have a receiver appointed by such court, to collect and preserve the rents and profits pending the determination of the question of validity;[3] so also, where some of the trustees refuse to act, and all the parties are before the court and consent to the appointment.[4]

In an action for an accounting a receiver will be appointed where the trustee is insolvent and has acted in violation of his trust in failing to apply the trust funds according to the terms of the deed, and in appropriating the income to his personal use.[5] But the relief will be refused where there is no danger. Accordingly, bad habits on the part of the trustee and his unfitness for the position are insufficient grounds, where there is no reasonable apprehension of danger.[6] And the fact that the trustee has mingled the trust funds with his own private funds, it not being alleged that the trust fund is in danger, and there being no allegation that the trustee does not keep proper accounts, will not warrant the appointment of a receiver.[7]

Section 592. **Receivers in Cases of Trusts Created by the Legislature.**—The rule which guides the court in appointing receivers of public trusts has been well stated by Mr. Justice Bradley in Vose v. Reed.[8] He says: "Now these public and political objects of the trust make it extremely fitting that the chief executive officers of the state should administer the fund, and it must be a very strong case indeed which will induce the court to take the property out of their hands and put it into the hands of its own

[1] Attorney-General v. Bowyer, 3 Ves. 714.

[2] *In re* Fowler, L. R. 16 Ch D. 723.

[3] McCosker v. Brady; 1 Barb. Ch. 329. *Cf.* Middleton v. Sherburn, 4 Y. & Coll. 358; Palmer v. Wright, 10 Beav. 284.

[4] Brodie v. Barry, 3 Meriv. 695.

[5] Albright v. Albright, 91 N. C 220.

[6] Poythress, 16 Ga. 406.

[7] Orphan Asylum v. McCartee, Hopk. Ch. 429. *Cf.* Hooley v. Grieve, 9 Abb. N. C. 8.

[8] 1 Woods, 647, 651.

officers. The legislature has seen fit to entrust the chief officers of the state with these important duties, and it would show a great disrespect to this co-ordinate branch of the government for the judiciary, on light grounds, to displace these officers from the trust, and to put appointees of its own in their stead. * * * It would be very strange if the courts could not, in some way, secure the rights of parties having an interest in the fund, without removing from the trust those official personages to whose administration it has been entrusted by the legislature. * * * To my mind it seems to be a case in which, if a receiver can be appointed at all, the appointment ought not to be made until every other remedy has been tried in vain."[1] In that case public lands were vested in designated state officers as trustees, who were authorized to sell the lands and to look after their drainage, settlement and cultivation.

So also, a receiver was refused where the holder of a public contract appointed another person trustee of the moneys to be received thereunder, and authorized him to deduct certain advances he had made and afterwards to pay the remainder over to other persons, to whom an interest in the profits had been assigned in order to raise funds sufficient to enable him to perform his contract, it appearing that the trustee had also been appointed to indemnify the sureties of the contractor. Here a party interested in the profits made the application, and the grounds of the refusal were that the appointment might tend to destroy the value of the contract, that the majority of those interested had not concurred in the application, and that the allegations of the petition were denied and were not sustained by corroborative evidence.[2]

Section 593. **Receivers Pendente Lite.**—Where a suit is brought to remove a trustee upon the ground of unfitness, the appointment of a receiver, *pendente lite*, is a matter of discretion.[3] But the appointment will not be made before answer unless there is great or impending danger to the property, or of loss to the plaintiff.[4] And in an action for an accounting and to recover possession of certain property, the plaintiff claiming as executory devisee upon the death of the wife of defendant without issue, the defendant hav-

[1] See also as to the powers and duties of receivers appointed by the state, State of Tennessee v. Edgefield & Kentucky R. R. Co. 6 Lea (Tenn.) 353.

[2] Devlin v. Hope, 16 Abb. Pr. 314, where the plaintiff held an eighth interest in the profits.

[3] Janeway v. Green, 16 Abb. Pr. 215 (n). A contrary doctrine was announced in Poythress v. Poythress, 16 Ga. 406, where it was said that a strong case must be made out.

[4] Latham v. Chafee, 7 Fed. Rep. 525.

ing taken possession and being unable to respond in damages, a receiver will be appointed in the interest of the plaintiff upon the ground of danger of loss.[1]

The loaning of a portion of the trust funds by the trustee, without leave of court, to a banking firm of which he is the senior member, and which soon thereafter becomes insolvent, is a breach of trust and will justify the appointment of a receiver. It is no defence that collateral security, thought to be good at the time, was taken, and such action constitutes a good ground for the removal of the trustee.[2] A receiver may be allowed to the seller of building materials in an action to recover their value, where the materials furnished were used to improve trust property, the seller being ignorant that the property was held in trust. But only that portion of the increased rent due to the improvement can be applied to the satisfaction of the claim, and the receiver will be directed to collect the rents and divide it between the creditor and the trustee.[3] Where a trustee has been directed to pay moeny due from him in respect of an alleged breach of trust, into court, and the order can not be enforced by attachment, the trustee having removed himself beyond the jurisdiction of the court, a receiver of property belonging to the trustee may be appointed under the English jurisdicture act.[4]

Section 594. **Receivers Pending Litigation over Probate.**— It seems to be a well established rule in England that the court will appoint a receiver pending a contest over the probate of a will. The appointment is made in the interest of all concerned, and proceeds upon the ground that, until the validity of the will is established, no interested party has the right to receive and care for the property.[5] In this country courts of probate, or courts with the powers of a surrogate, have, in general, power to appoint a temporary administrator in such cases.[6] It is not a ground of objection to an application for such a receiver that the bill, by which the litigation is commenced, is essentially a bill for discovery;[7] and it is not necessary to bring to a hearing a suit for the appointment of a

[1] Ladd v. Harvey, 21 N. H. 514.

[2] North Carolina R. R. Co. v. Wilson, 81 N. C. 223.

[3] Malone v. Buice, 60 Ga. 152.

[4] *In re* Coney, L. R. 29 Ch. D. 993; Stanger Leathes v. Stanger Leathes, 17 Weekly Notes, 71.

[5] Rendall v. Rendall, 1 Hare, 152; Wood v. Hitchings, 2 Beav. 289; s. c. 3 Id. 504; Middleton v. Sherburne, 4 Y. & Coll. 358; Anderson v. Guichard, 9 Hare, 275.

[6] New York Code Civ. Pro section 2668.

[7] Wood v. Hitchings, 2 Beav. 289.

receiver *pendente lite*, in a controversy between executors of the same estate.[1] After a will has been admitted to probate and an action is brought to revoke the probate, the fact of the pending litigation is not, *per se*, a sufficient reason for the appointment;[2] but a receiver may be allowed where an executor consents that the question of the validity of the will under which he acts may be litigated.[3]

Section 595. **Receivers in Actions to Set Aside Sales.**—Where an executor has, with an evidently fraudulent intent, conveyed away property bought with the trust money of an estate, for the purpose of preventing a levy upon it by a devisee for the amount of the decree in his favor, it is proper for the court to appoint a receiver to take possession of the property and to sell it, and to collect and invest the proceeds for the beneficiary, instead of merely directing the trustees to do so.[4] So, also, a receiver may be appointed upon the motion of a plaintiff equitably interested in the profits arising from a sale of lands devised by a decedent to his executors, the possession of the latter being deemed adverse.[5]

Section 596. **Receivers as Against Executors and Administrators.**— While the jurisdiction of courts of equity to appoint receivers upon the principle of trusteeship, is well established, still it is to be exercised with caution, and only in cases of imperative necessity.[6] To move the court to act, it must be satisfied of manifest danger of loss or injury to the property arising from the waste, misconduct, incapacity or insolvency of the executor or administrator.[7] Hence, where the bill fails to show such danger, and its allegations are indefinite and uncertain, or where the allegations are fully and satisfactorily denied by the respondent, the relief will be refused. This, at least in the case of an administrator, is upon the ground that the court or ordinary issuing the letters, may discharge the acting administrator and appoint another, calling the one dis-

[1] Anderson v. Guichard, 9 Hare, 275.

[2] Newton v. Ricketts, 10 Beav. 525.

[3] Watkins v. Brent, 1 Myl. & C. 97; s. c. 7 Sim. 512.

[4] Gunn v. Blair, 9 Wis. 352. The court will not force the plaintiff in such a case to have recourse to a sale under execution.

[5] Marvine v. Drexels' Executors, 68 Pa. St. 362.

[6] Powell v. Quinn, 49 Ga. 523; Steele v. Cobham, L. R. 1 Ch. App. 325; Hervey v. Fitzpatrick, Kay, 421; Rendall v. Rendall, 1 Hare, 152.

[7] Harrup v. Winslet, 37 Ga. 655; Dougherty v. McDougald, 10 Id. 121; Middleton v. Dodswell, 13 Ves. 226; Brooker v. Brooker, 3 Smale & G. 475; Jenkins v. Jenkins, 1 Paige, 243.

charged to an account.[1] The appointment is regulated, in general, by the principles of *quia timet*;[2] and it will not be made before answer except under very exceptional circumstances.[3] Upon the application it is not competent for the court to examine the accounts of the executor rendered to the probate court, in order to sustain the allegations of the bill.[4] The rule concerning the sufficiency of allegations on information and belief, is clearly stated by Mr. Justice Woods,[5] as follows: "The party in possession of the property for which a receiver is asked, is the executor named in the will of the testatrix, who has qualified in the probate court and given bond for the faithful discharge of his trust. Under these circumstances the court should not displace him upon light grounds, and though a suit be instituted by a party having an interest in the estate, it does not follow that the trust created by the testator is to be set aside. A strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act. * * * These charges are not directly made, but are stated on information and belief of complainants, and they are not supported by a single affidavit to any fact. The application to appoint a receiver must be supported by evidence showing that the appointment is necessary. There is absolutely no testimony to support the application in this case. * * * This [the verification of the bill] is not evidence, and gives no support to the application. The fact is that the court is asked to appoint a receiver in this case on mere rumor, without any proof showing the necessity of the appointment."[6]

Section 597. **What will Constitute Ground for the Relief.**— In general, the application must be based upon an abuse of trust on the part of the trustee, or such conduct upon his part as leads to the conclusion that an abuse is imminent. Thus, where there was a manifest breach of the trust by wasting the property, not in a single instance but as an habitual and prospective course of dealing, a receiver was appointed.[7] There is the greater reason for the ap-

[1] Powell v. Quinn, 49 Ga. 523; Fairbairn v. Fisher, 4 Jones Eq. 390.

[2] Dougherty v. McDougald, 10 Ga. 121.

[3] Middleton v. Dodswell, 13 Ves. 226. *Cf.* Scott v. Becher, 4 Price, 346.

[4] Simmons v. Henderson, Freem. (Miss.) 493.

[5] Haines v. Carpenter, 1 Woods, 262, 265, *et seq.*

[6] Haines v. Carpenter, 1 Woods, 262, 265, *et seq.* The grounds upon which the application in this case was made, were the incompetency of the executor, his neglect to cultivate the entire estate, his efforts to defeat the bequest to the applicant and the institution of fictitious suits in order to use up the assets — the allegations being on information and belief.

[7] Middleton v. Dodswell, 13 Ves. 226.

pointment where the executor admits the waste and the misappropriation, and refuses to show what has become of the funds;[1] and if an administrator, instead of collecting the assets, acts in such a manner as to hinder and delay the collection of them, it is proper to appoint a receiver;[2] and where the executors delay unnecessarily in settling the estate, and have paid certain heirs more than their shares, and besides have misapplied other funds and are insolvent, a receiver will be allowed.[3]

The appointment may be made upon the application of an infant by its guardian.[4] And where an executrix allowed her husband to manage the estate, and he was incompetent and misappropriated the funds and involved the estate in debt,[5] or where the property was in danger of being lost, and the application was made two years after the executor had absconded, a receiver will be allowed.[6]

Section 598. **Receivers in Behalf of Infants as Against Adverse Holders.**—A receiver may be appointed in behalf of an infant where his property has been taken by a person hostile to his interests, claiming a right to dispose of the same for his own benefit. Thus, where an infant bought goods and mortgaged them to secure payment, and, upon default, the mortgagee took possession of them, and also of other property which he was about to sell, a receiver was allowed the infant in an action to disaffirm.[7]

Section 599. **Receivers in Cases of Lunacy.**—A receiver of a lunatic's estate may be appointed upon petition.[8] So, also, where the committee can not give the requisite security.[9] But usually the court will avoid appointing such a person the committee;[10] and where the committee resides at a distance from the estate,[11] or is infirm,[12] or pending a commission of lunacy,[13] the court may properly appoint a receiver. The receiver will be required to give the same

[1] Price's Executrix v. Price's Executors, 23 N. J. Eq. 428. In this case it was said that the receivership would only extend to assets in the state, including debts due from residents, or secured by collaterals within the state.

[2] DuVal v. Marshall, 30 Ark. 230.

[3] Jenkins v. Jenkins, 1 Paige, 243.

[4] Ware v. Ware, 42 Ga. 406; Stairley v. Rabe, McMull. Eq. 22; Pitcher v. Helliar, Dick. 580; Havers v. Havers, Barn. 23. *Cf.* Anon. 1 Atk. 489; *Ex parte* Whitfield, 2 Id. 147, 315.

[5] Stairley v. Rabe, McMull. Eq. 22.

[6] Pitcher v. Helliar, Dick. 580.

[7] Skinner v. Maxwell, 66 N. C. 45; s. c. 68 Id. 400.

[8] *Ex parte* Whitfield, 2 Atk, 147, 315.

[9] *Ex parte* Bellinghurst, 1 Amb. 104.

[10] *In re* Frank, 2 Russ. 450

[11] *In re* Seaman, Shelford on Lunacy, 149.

[12] *In re* Birch, Id.

[13] *In re* Kenton, 5 Binn. (Pa.) 618. *Cf. In re* Heli, 3 Atk. 685.

security that a committee would;[1] but neither a committee nor a receiver, after consenting to act, will be discharged without some sufficient excuse properly presented.[2]

A receiver may also be appointed after the death of the lunatic, pending proceedings for the determination of the rights of claimants;[3] and a receiver, previously appointed, may be directed to continue to act after the death of the lunatic until all arrears of rents and profits are paid and satisfied.[4] But where the committee, after the death of the lunatic, was appointed receiver of the estate, he may be called to account and discharged upon the appointment of an administrator *pendente lite*.[5] Where a receiver neglects to render just and true accounts any party in interest may call upon him to account; and, upon such accounting, the court may direct a reference to inquire into and report upon the condition of the estate, the liens upon it, the debts and income, and the sum necessary for the support of the lunatic.[6]

Section 600. **Of the Poverty or Insolvency of the Trustee as a Ground.**—As a general rule the poverty or insolvency of a trustee, especially if it existed at the time of the appointment, is not a ground for a receiver; there must be in addition thereto some danger of loss to the estate.[7] It has been well said that "if the person selected by the testator for this office, was an insolvent debtor at the date of the testator's will, and was selected by the testator for this office, with a full knowledge that the person chosen was such insolvent debtor, this court will not, on that ground alone, interfere to take the property out of the hands of such executor."[8]

[1] *Ex parte* Warren, 10 Ves. 622; *Ex parte* Radcliff, 1 Jac. & W. 619.

[2] *In re* Lyle, 2 Paige, 251; Smith v. Vaughan, Ridg. *temp.* Hardw. 251.

[3] *In re* Rachel Colvin, 3 Md. Ch. 288. But see *In re* Ferrior, L. R. 3 Ch. App. 175; Carrow v. Ferrior, Ib. 719, where the chancellor refused to exercise his discretion, and permitted the application to be made to the vice-chancellor.

[4] *Ex parte* Clarke, Jac. 589.

[5] Ellicott v. Warford, 4 Md. 80; *In re* Rachel Colvin, 3 Md. Ch. 288.

[6] Lowe v. Lowe, 1 Tenn. Ch. 515. The application here was on the petition of a defendant, the daughter of the lunatic.

[7] Knight v. Duplessis, 1 Ves. 324; Anon. 12 Id. 4; Howard v. Papera, 1 Madd. 141; Fairbairn v. Fisher, 4 Jones Eq. 390; Johns v. Johns, 23 Ga. 31; Hathernwaite v. Russell, 2 Atk. 126; Albright v. Albright, 91 N. C. 220. *Cf.* Bowling v. Scales, 2 Tenn. Ch. 63; Havers v. Havers, Barn. 22; Ware v. Ware, 42 Ga. 408; Jenkins v. Jenkins, 1 Paige, 243. *Cf.* Dillon v. Lady Mount Cashell, 4 Bro. Parl. Cas. 306, where a widow, having been appointed guardian of her children by her late husband, married a second husband who was in necessitous circumstances.

[8] Stainton v. The Carron Company, 18 Beav. 161. *Cf.* Langley v. Hawk, 5 Madd. 46; Smith v. Smith, 2 Y. & Coll. 353. *Cf.* Gladdon v. Stoneman, 1 Madd. 143 (n.); Manners v. Furze, 11 Beav. 31.

But a different case is presented where a sole executor is adjudged a bankrupt upon his own petition and assignees or receivers of his estate are appointed; a receiver of the estate of the decedent is then allowable upon the ground that there is no competent trustee to protect it.[1] And where it appears that the estate is not sufficiently secured, an appointment may be made, pending an accounting, to take effect unless additional security be given.[2] A receiver is sometimes appointed of part of the estate only, as of the rents, issues and profits of realty, without prejudice to an application for a receiver of the personalty.[3] Sometimes, in the case of executors and administrators, the surrogate, ordinary or probate court has power to require additional security, in default of which it will remove the receiver.[4] But great age on the part of the trustee has been held not a ground for his removal and the appointment of a receiver in his stead.[5]

Section 601. **Receivers in Cases of Joint Trustees.** — Mere disagreement among joint trustees as to the proper care and management of their charge will not justify the appointment of a receiver;[6] nor will the fact that one or more of those appointed decline to act;[7] but such an application has been allowed in favor of infant *cestuis que trust*.[8] The court may, in a proper case, assume control of the trust property, where the motion for a receiver is made by a residuary legatee, upon the ground of habitual abuse of the trust, where it is alleged that two out of the three executors are parties to the malfeasance;[9] so also, where one of two executors died and the other refused to act.[10] It is a generally recognized rule where a receiver is appointed on account of the misconduct of one or more of several joint trustees, that if there remain one unobjectionable trustee, he will be allowed to act in connection with the receiver.[11] And where a co-executor does not qualify but con-

[1] Steele v. Cobham, L. R., 1 Ch. App. 325.

[2] Gray v. Gaither, 74 N. C. 237.

[3] Gladdon v. Stoneman, 1 Madd. 143 (n.)

[4] Wood v. Wood, 4 Paige, 299; Rex v. Raines, Carth. 456; s. c. Holt, 310; Duncumbau v. Stint, 1 Ch. Cas. 121; Rous v. Noble, 2 Vern. 249; Batten v. Earnley, 2 P. Wms. 163; Slanning v. Style, 3 Id. 336. Dillon v. Viscountess Mount Cashell, 3 Bro. Parl. Cas. 348.

[5] Hosack v. Rogers, 6 Paige, 415.

[6] Fairbairn v. Fisher, 4 Jones Eq. 390.

[7] Browell v. Reed, 1 Hare, 434. The application in this case was made in behalf of infant heirs.

[8] Tait v. Jenkins, 1 Y. & Coll. Ch. 492.

[9] Middleton v. Dodswell, 13 Ves. 226.

[10] Palmer v. Wright, 10 Beav. 234.

[11] Jenkins v. Jenkins, 1 Paige, 243. The ground in this case was the insolvency coupled with the misconduct of three out of four acting executors.

sents to the appointment of a receiver, such an appointment will not necessarily be revoked upon his subsequent qualification.[1]

Section 602. **Of the Effect of the Removal of the Trustee Beyond the Jurisdiction of the Court.** — While the court will not ordinarily appoint a receiver in these cases unless strong grounds are presented, nevertheless where he removes from the state, going beyond the reach of the process of the court, so as to prevent it from calling him to account, it becomes the duty of the court upon the application of the *cestui que trust*, to assume control of the trust property.[2] Thus a receiver was appointed where an executor turned over the assets to an intemperate and insolvent co-executor and left the state;[3] also where an executrix married an impecunious person without the jurisdiction.[4]

Section 603. **Receivers in Cases of Foreign Trustees.** — The English court of chancery has frequently appointed receivers, as against non-resident trustees and executors, of property brought by them within the jurisdiction, in favor of resident *cestuis que trust*, legatees and devisees; and in these cases little or no attention has been paid to the ordinary grounds for the exercise of the jurisdiction. The principles upon which the appointment is made in these cases, seem to be analagous to those which regulate the issue of the writ of *ne exeat*.[5] Similarly an appointment was made where the property and the beneficiaries were in England and the devisee in trust and the executors were non-residents,[6] and a receiver was granted a resident executor, the property being in India, where his co-executor had died.[7]

Section 604. **Receivers in Aid of Creditors.** — Where a creditor has instituted a suit upon a judgment recovered by him, and the debtor dies pending the litigation, the suit not only abates, but it is also improper to file a bill of revivor. In such cases the property of the deceased debtor is to be disposed of in the due course of administration according to the statute, under which the creditors

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[1] Fraser v. City Council, 19 S. C. 384. *Cf. In re* Colvin, 3 Md. Ch. 278.

[2] *Ex parte* Galluchat, 1 Hill Eq. 148. *Cf.* Buchanan v. Hamilton, 5 Ves. 722.

[3] Edmunds v. Crenshaw, 1 McCord. (S. C.) 252.

[4] Taylor v. Allen, 2 Atk. 213. This was under the common law rule making it necessary for the husband of a *feme covert* to be joined as a party in action against her.

[5] Hervey v. Fitzpatrick, Kay, 421. The application in this case was made by a resident administrator.

[6] Smith v. Smith, 10 Hare, Appendix, lxxi.

[7] Cockburn v. Raphael, 2 Sim. & St. 453.

may all come in.[1] There is, however, a dictum in a New York decision to the effect that, if a receiver has been appointed and has obtained possession of the property of the debtor before his death, the court, having possession through its officer, will not part with it to the executor or admimistrator, but will apply it to the payment of the debt, with due regard to the statutory rights of other creditors.[2] But where a trustee after his removal obtains, by fraudulent representations as to his solvency, possession of the property belonging to the estate, and abuses the trust, being insolvent, the creditors, in an action against him, may apply for and obtain a receiver.[3] And a receiver may be allowed to a creditor upon a bill against an executor where he alleges the absence of security, and the executor's mismanagement, insolvency and intent to leave the state, in a case where no answer is filed and the allegations are not otherwise denied.[4] The relief will be refused *ad interim* where the claim upon which the appointment is sought, was originally not charged to the trust estate but to the trustee personally, and the evidence is conflicting upon the question of the liability of the estate.[5]

Section 605. **Receivers in Aid of Sureties.** — There is no equity to sustain a bill by sureties of a decedent against persons alleged to be intermeddling with the estate and to have the custody of the assets without authority.[6] Nor can the surety on an administrator's bond maintain a suit to require the administrator to secure him, or, in the alternative, that a receiver be appointed.[7] But where an administrator sold land which was bought by his sister, and the plaintiffs became her sureties for the payment of the purchase money, and subsequently a judgment was recovered against them and the buyer for the balance due, and the administrator being insolvent and in possession, it was held that the plaintiff was entitled to a receiver to resell the property, and to an injunction against the administrator restraining him from collecting the amount due on the judgment.[8]

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[1] Sylvester v. Read, 8 Edw. Ch. 296; Mathews v. Neilson, Id. 346.

[2] Mathews v. Neilson, 8 Edw. Ch. 346, 348.

[3] *Ex parte* Walker, 25 Ala. 81.

[4] Chappell v. Akin, 89 Ga. 177.

[5] Hatcher v. Massey, 66 Ga. 66; where the relief was asked upon the ground of the trustee's insolvency.

[6] Walker v. Drew, 20 Fla. 908.

[7] Delaney v. Tipton, 8 Hayw. (Tenn.) 14. It seems that in such a case, if the court considered the interests of minors endangered, it might make the appointment in their behalf.

[8] Stenhouse v. Davis, 82 N. C. 432.

Section 606. **Of the Selection of a Receiver in These Cases.** — The general rule is that a trustee is ineligible because, on account of the fiduciary position which he occupies, he is not indifferent and disinterested, and because the two characters are essentially incompatible.[1] The trustee has other duties to perform, and he should be a check upon the conduct of the receiver. This principle also excludes the next friend of an infant,[2] and also the solicitor under a commission of lunacy.[3] The fact that there are two or more trustees will not make one of them eligible.[4] But where, from the superior knowledge and experience which the trustee acquires from the performance of his duties as trustee, he seems to be the most capable person that can be secured to take the care of the trust property, it may be proper that he be appointed receiver, and that, too, even for the protection of infants, but in such a case he is not entitled to any additional compensation in his capacity as receiver.[5]

Section 607. **Of the Effect of the Appointment of a Receiver Herein.**—A court of equity has no power to remove an officer appointed by another and competent court, and to appoint in his stead one of its own officers. Hence the appointment of a receiver of the estate of a decedent does not displace an executor or administrator appointed by a probate court.[6]

The receiver cannot, unless authorized by the court, interfere in suits pending against an executor at the time of his appointment,[7] and the appointment of a receiver does not put an infant in whose behalf he acts, out of possession.[8] But the court may authorize its receiver to bring actions in the name of a trustee whom he supersedes and who is restrained from exercising his functions, upon securing himself against costs;[9] he must, however, indemnify the trustee in any event.[10] A receiver appointed in behalf of an infant is liable to the latter for interest if he fail to invest the funds when

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[1] Sykes v. Hastings, 11 Ves. 363; Blank v. Jolland, 8 Id. 72; Sutton v. Jones, 15 Id. 584; Stone v. Wishart, 2 Madd. 63.

[2] Stone v. Wishart, 2 Madd. 63.

[3] *Ex parte* Pincke, 2 Meriv. 452.

[4] Blank v. Jolland, 8 Ves. 72; Sykes v. Hastings, 11 Ves. 363.

[5] Hibbert v. Jenkins, cited in Sykes v. Hastings, 11 Ves. 363; Newport v. Bury, 23 Beav. 30.

[6] Leddel's Executor v. Starr, 19 N. J. Eq. 159. It may be remarked here that a receiver of the individual effects of an administrator has no right to interfere with the duties of such administrator, and if he collect rents belonging to the estate, they may be recovered back—as paid under mistake. Barker v. Clark, 12 Abb. Pr. (N. S.) 106.

[7] Gadsden v. Whaley, 14 S. C. 210.

[8] Sharp v. Carter, 3 P. Wms. 379.

[9] Green v. Winter, 1 Johns. Ch. 60.

[10] Taylor v. Allen, 2 Atk. 213.

sufficient; and the settlement of his accounts, when the infant becomes of age, is not a bar to the recovery thereof.[1] But a receiver has been authorized to pay out the funds of a minor in order to relieve tenants impoverished by the failure of crops.[2]

Section 608. **Of the Discharge and Removal of the Receiver.** — The receiver will not be discharged until the object for which the appointment was made has been attained. Thus, the receiver of the estate of several infants will not be discharged until all have reached their majority.[3] Moreover an infant should be allowed a fair time after coming of age within which to examine the receiver's accounts, and the receiver should not be discharged until such reasonable time has elapsed.[4] The executors or administrators of a deceased receiver may apply to the court for a second receiver, to which they may account for property which they received from the decedent.[5] Where a receiver had left the country the court ordered him to account, and ordered executors who had previously declined to act, but were now willing to do so, to act, instead of appointing a new receiver.[6] And where trustees were removed on account of misconduct, and a receiver was appointed, the latter was discharged when new trustees took the management of the property, the court being satisfied that no harm would result.[7]

[1] Hicks v. Hicks, 3 Atk. 274.

[2] Jackson v. Jackson, 2 Hogan, 288.

[3] Smith v. Lyster, 4 Beav. 227.

[4] Wildridge v. McKane, 2 Moll. 547. According to the usual practice in chancery the infant is allowed a year after coming of age to investigate the accounts of his guardian. Matter of Van Horne, 7 Paige, 46.

[5] Williamson v. Wilson, 1 Bland. Ch. 435. *Cf.* Combs v. Jordan, 3 Id. 284. A petition praying that such executors be ordered to account was dismissed by an English vice-chancellor. Jenkins v. Briant, 7 Sim. 171.

[6] Davy v. Gronow, 14 L. J. (N. S.) Ch. 134.

[7] Bainbrigge v. Blair, 3 Beav. 421; *In re* Colvin, 3 Md. Ch. 278.

CHAPTER XIX.

RECEIVERS IN JUDGMENT CREDITORS' ACTIONS AND IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

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I.

Receivers in Judgment Creditors' Suits.

Section 609. **Introductory.** — One of the most important classes of cases in which a receiver is appointed is that in which the appointment is made in behalf of judgment creditors.[1] The jurisdiction is founded essentially upon the inadequacy of the remedies offered at law, and, although at present this remedy has largely given place to the modern and statutory proceeding supplementary to execution, which is generally a summary proceeding, yet, according to a well established principle of the law, equity does not thereby lose its jurisdiction.

This subject is, moreover, of great practical importance because the statutory proceeding is founded upon it, because the courts follow the chancery precedents as far as they are applicable, and, because, as a rule, the powers and duties of receivers are still largely governed by these precedents, the statute having been intended almost exclusively to regulate the practice in reference to obtaining the appointment.

Upon general principles of equity jurisprudence a receiver is generally allowed a judgment creditor, almost as a matter of course, upon his filing a bill showing the recovery of a judgment, the issue of an execution thereon and the return thereof unsatisfied.[2] And it has been said that the filing of a creditor's bill and the service of the process create, in equity, a lien on the effects of the debtor, which has been termed an equitable levy thereon.[3] If an injunction had been issued, the appointment was especially favored, in as

[1] Harman v. McMullin, 85 Va. 187.

[2] Bloodgood v. Clark, 4 Paige, 574; Osborn v. Heyer, 2 Id. 342; Fitzburgh v. Everingham, 6 Id. 29; Bank of Monroe v. Schermerhorn, Clarke's Ch. 214; Johnson v. Tucker, 2 Tenn. Ch. 398; Jones v. Pugh, 8 Ves. 71.

[3] Tilford v. Burnham, 7 Dana, 110; Miller v. Sherry, 2 Wall. 249; Beck v. Burdett, 1 Paige, 305; Edgell v. Haywood, 3 Atk. 357.

much as it tended to protect the debtor's interest in the property;[1] and it has been held to be the creditor's duty, under such circumstances, to apply for a receiver.[2] But a receiver will not be appointed *ex parte* unless some special ground exists which necessitates the taking of immediate action, as where the property is of a perishable nature, or consists of choses in action which may be lost unless immediately collected or secured.[3]

If the answer of a bailee admits having funds, he may be directed to pay them into court before final decree.[4] The relief will be allowed where the bill alleging assets out of which the claim should be paid is taken *pro confesso*.[5]

Section 610. **Of the Practice Herein.** It was the former practice in the court of chancery in New York, to direct a reference for the purpose of selecting a suitable person as receiver, and to determine what property ought to be delivered to the receiver when appointed. This was done in order to prevent disputes between the receiver and third persons, the decision of the referee being a protection to the receiver under which he might limit the amount of his seizures.[6] The refusal by the debtor to make an assignment will not justify the master in not deciding what property belongs to the debtor and is within his control, and in failing to order its delivery to the receiver.[7] The same rule prevails here, as in other cases involving the right to a second or subsequent receiver upon the motion of creditors who seek to come in subsequently to the first appointment, and it is held that the court will not appoint a

[1] Fitzburgh v. Everingham, 6 Paige, 29.

[2] Osborne v. Heyer, 2 Paige, 342; Bank of Monroe v. Schermerhorn, Clarke's Ch. 214. In the former case where one creditor had obtained an injunction and another a receiver, the proceeding being attachment for the non-delivery of property to the receiver, the debtors were ordered to deliver and the attachment was suspended.

[3] Sandford v. Sinclair, 8 Paige, 373; affirming s. c. 3 Edw. Ch. 393. But see Bank of Monroe v. Schermerhorn, Clarke's Ch. 214; Austin v. Figueira, 7 Paige, 56, where a receiver was allowed before answer, an injunction having been issued.

[4] Rutherford v. Jones, 26 Ga. 150. The bill in this case was filed by the receiver of the estate of a deceased person. As to the effect of an insufficient denial, see Bloodgood v. Clark, 4 Paige, 574.

[5] Runals v. Harding, 83 Ill. 75.

[6] Dickerson v. Van Tine, 1 Sandf. Super Ct. 724. In this case is pointed out specifically the method of delivering different kinds of personal property and the means of enforcing delivery. Green v. Hicks, 1 Barb. Ch. 309. This case determines the nature and limits of the examination of the debtor. As to the necessity of including in the order directing the delivery of property an exception of exempt property, see Dickerson v. Van Tine, 1 Sandf. Super. Ct. 724; Cagger v. Howard, 1 Barb. Ch. 368.

[7] Eldred v. Hall, 9 Paige, 640.

second receiver, but will rather extend an existing receivership. If the receiver already appointed refuse to act or to give additional security when required, he may be removed and a new appointment made.[1]

Section 611. **Of the Effect of Denials by the Defendant.** — Where the answer positively denies the debt, in the absence of other evidence, the relief will be refused.[2] And where there are reasonable grounds for suspecting irregularities in the judgment or execution, the application may be denied, pending an investigation of the supposed irregularity.[3] But a denial by the defendant that he has any effects to the possession of which a receiver would be entitled, is not a sufficient ground for refusing the appointment;[4] neither is an affidavit that he has no property to the amount of the plaintiff's demand a sufficient ground,[5] nor will such a denial excuse the defendant from executing a formal assignment.[6]

Section 612. **When a Receiver may be Appointed in these Cases — Necessity of Judgment.** — A receiver will be appointed in the interest of a creditor upon a second bill filed by him, the first having been dismissed on demurrer, where he alleges the recovery of a judgment and a levy upon certain property to which there were conflicting claims, if it further appear that the plaintiff is threatened with loss unless he is allowed the relief.[7] And where a business is wholly conducted and managed by the debtor in the name of his wife, he acting apparently as her agent, being also assisted therein by his minor children, a receiver of the assets may be appointed where it appears that the defendants are disposing of the property

[1] Bank of Mutual Redemption v. Sturgis, 9 Bosw. (N. Y.) 608; Cagger v. Howard, 1 Barb. Ch. 368.

[2] Fogarty v. Bourke, 1 Con. & Law. 565; La Chaise v. Lord, 4 E. D. Smith, 612; s. c. 1 Abb. Pr. 213; 10 How. Pr. 461. In this case, where the action was brought by one of a large number of creditors of an insolvent firm against both general and special partners, asking for an injunction and a receiver, the special partner denied his indebtedness.

[3] Bank of Wooster v. Spencer, Clarke's Ch. 386. But see Lent v. McQueen, 15 How. Pr. 313 — where it was alleged that the judgment was confessed to secure a contingent liability not matured, and the court held that it could not go behind the judgment and execution.

[4] Browning v. Bettis, 8 Paige, 568; Bloodgood v. Clark, 4 Id. 574. In the first case it was held that the order for the delivery of property to a receiver should be general, even though the debtor admits having certain property, but denies having certain other specified property. Chipman v. Sabbaton, 7 Paige, 47; Fuller v. Taylor, 6 N. J. Eq. 301.

[5] Fitzburgh v. Everingham, 6 Paige, 29.

[6] Chipman v. Sabbaton, 7 Paige, 47.

[7] Field v. Jones, 11 Ga. 418.

and calling in outstanding claims.[1] Where the debtor has placed his property in such shape that a judgment is not a lien upon it, or has created a trust for his own benefit to the prejudice of his creditors, a receiver is a proper relief.[2] And under the English Bankruptcy act of 1861, where a debtor agreed to manage his property according to the direction of certain inspectors appointed under a deed for the benefit of his creditors, a receiver will be allowed where he violates such agreement, and is receiving and applying assets to his personal use, and thus hindering the settlement of his affairs.[3] A receiver will be appointed where the real property of the debtor is insufficient to pay the claims, and is incumbered with mortgages and judgments, and the priorities are unascertained;[4] and, in some jurisdictions, a receiver will be appointed at the instance of creditors in an action to charge the separate estate of a married woman for debts contracted by her in her individual business, where there is danger that the separate estate will be dissipated or carried out of the state.[5] And, in England, where creditors sought a sale of real estate in the hands of an infant heir, they were allowed a receiver.[6] And a receiver of realty might be appointed in the first instance, where the answer of the defendants shows that there was no personalty, and that the rents and profits of the realty must ultimately be subjected to the payment of the debt.[7] A receiver has also been allowed where the only property a debtor had was a life estate, and he had gone out of the country.[8]

To be entitled to have a receiver of the rents of real estate appointed, a judgment creditor should be fairly in court with respect of the estate.[9] Creditors who have neither lien nor title, and have not recovered judgment, are not entitled to a receiver in a suit to

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[1] Penn v. Whiteheads, 12 Gratt. 74. The receiver in such a case should not be directed to pay creditors until their claims and priorities have been determined by the court.

[2] Johnson v. Woodruff, 8 N. J. Eq. 120; s. c. affirmed, Id. 729. In this case the debtor had a life interest in certain premises and had used his own funds to erect a building thereon, the rents of which he was receiving. *Cf.* McCraith v. Quin, Ir. Rep. 7 Eq. 324.

[3] Riches v. Owen, L. R. 3 Ch. App. 820. The fact that the property may have to pass through the bankrupt court is not an objection to the relief.

[4] Smith v. Butcher, 28 Gratt. 144. The receiver will be directed to take possession, collect arrears of rent and give leases. *Cf.* Grantham v. Lucas, 15 W. Va. 425.

[5] Todd v. Lee, 15 Wis. 365.

[6] Sweet v. Partridge, 1 Cox, 438. It seems from the same case as reported in Dick. 696, that a receiver had already been allowed in an ordinary creditor's suit seeking satisfaction out of the personalty first.

[7] Jones v. Pugh, 8 Ves. 71.

[8] McCraith v. Quin, Ir. Rep. 7 Eq. 324.

[9] Congdon v. Lee, 3 Edw. Ch. 304.

set aside an assignment and pretended sale by the debtor of his assets.[1]

It is not correct that a receiver cannot be appointed after answer filed and before replication, or until the proofs show that there is property to go into the hands of a receiver. A broad discretion is lodged in the court to appoint a receiver in cases where executions have been returned unsatisfied.[2] While a court may appoint a receiver on a creditor's bill where it is "just or convenient" to do so, yet these words do not confer an arbitrary or unregulated discretion on the court, and do not empower the court to invent new modes of enforcing judgments in substitution of the ordinary ones. In such case a receiver should not be appointed merely because it would be more convenient to obtain satisfaction in such manner.[3]

It has been held that under a statute authorizing the appointment of a receiver when a corporation is insolvent, any creditor was entitled to such appointment without first reducing his claim to judgment or in any other way making it a lien upon the corporate property.[4]

It is the general rule that a creditor's bill will not be entertained unless the claim has been reduced to judgment and an execution has been issued and returned in whole or in part unsatisfied.[5] While the rule is entirely reasonable in so far as it requires the claim to be first adjudicated, it is susceptible of criticisms in rigidly requiring the issuance and return of an execution. If it can be shown that the debtor has no property subject to execution, and that to issue the writ would be wholly without avail, it is beyond comprehension why the creditor should be compelled to waste money and effort, and may be an opportunity to secure his claim, in a vain undertaking. In this particular the rule violates the maxim, the law does not require the doing of that which is useless.

We have the declaration of the supreme court of Minnesota, that even when required by express statutory provision, the issuing of an execution will not be compelled as a condition precedent to the right of a judgment creditor to maintain his action, when it is made to appear that to have done so would have been without avail.[6]

Section 613. **Qualifications of the Rule.** — A court of equity is, in general, cautious in appointing a receiver to take possession of

[1] Pelzer v. Hughes, 27 S. C. 408.
[2] Dultin v. Thomas, 97 Mich. 93.
[3] Harris v. Beauchamp, 1 Q B. 801.
[4] San Antonia & Gulf Shore Railroad Co. v. Davis (Tex. Civ. Ap.) 30 S. W. R. 697.
[5] Clarke v. Raymond, 84 Io. 251.
[6] Klee v. Steele Co. 62 N. W. R. 399.

property in the hands of third persons whose title to the property is valid on its face, and such an appointment will be made only in cases of fraud clearly shown, or of imminent danger to the property.[1] Accordingly, where a creditor claimed that his debtor owned a certain estate in real property, and a conditional order appointing a receiver thereof had been made, it subsequently appearing that the debtor had only an equitable interest in a portion of the property, the court refused to make the order absolute.[2] So, likewise, the court will not interfere, except in extreme cases, with a mortgagee in possession where the debt is due and payable.[3] And if judgment creditors are in possession of the real property of the debtor, a receivership will be without prejudice to their rights, and they will not be required to attorn.[4]

Section 614. **General Rules Regulating the Appointment** — (*a*) **Diligence.** — Upon the principle "*Vigilantibus non dormientibus jura subveniunt*," a court of equity will not appoint a receiver in the interest of a creditor unless he act with reasonable diligence.[5] There can, in the nature of things, be no arbitrary rule as to what is reasonable time, but in each case it rests largely in the discretion of the court considering all the facts and circumstances of the case. Thus, where the creditor slept upon his rights for a number of years and had become a lessee of his debtor, a receiver was refused;[6] so also, where a creditor, without excuse, waited nine years after the return of his execution before filing a bill.[7]

Section 615. (*b*) **The Creditor Must First Exhaust His Remedy at Law.** — It is a general rule in equity that before the chancellor will act in behalf of a litigant, he must first have exhausted the remedy at law. And hence, if the papers show that the debtor has property which could be reached at law, a receiver will be refused, notwithstanding the rule that the return of an execution unsatisfied gives a *prima facie* right.[8] Thus, a receiver was refused where the bill itself showed property which could be levied upon;[9] so also,

[1] Vause v. Woods, 46 Miss. 120.

[2] Tredennick v. Graydon, 1 Dru. & War. 216.

[3] Quinn v. Brittain, 3 Edw. Ch. 314; Furlong v. Edwards, 3 Md. 99.

[4] Davis v. Duke of Marlborough, 1 Swanst. 74; s. c. 2 Id. 118.

[5] Gould v. Tryon, Walk. (Mich.) 353; Fogarty v. Bourke, 2 Dru. & War. 580.

[6] Fogarty v. Bourke, 2 Dru. & War. 580.

[7] Gould v. Tryon, Walk. (Mich.) 353.

[8] Cassidy v. Meacham, 3 Paige, 311; Smith v. Thompson, Walk. (Mich.) 1; Steward v. Stevens, Harring. (Mich.) 169; Thayer v. Swift, Id. 430; Parker v. Moore, 3 Edw. Ch. 234.

[9] Parker v. Moore, 3 Edw. Ch. 234, where an execution had been issued for three years; Starr v. Rathbone, 1 Barb. 70; Second Ward Bank v. Upmann, 12

where the bill showed that the defendant was the proprietor of a hotel and had a large amount of personal property, consisting of furniture and other appurtenances of the establishment.[1] And where tenants occupied certain premises known, both by the creditor and the sheriff, to belong to the debtor, and which had been offered in satisfaction of the debt, a motion to compel the tenants to attorn to a receiver and to pay the rents to him, was refused.[2]

Where the defendant's affidavit showed that the creditor's proceeding had been unnecessarily precipitated, and that he had had no notice of the amount of the judgment, and that he would have paid the debt if he had known the amount, and it also appeared that he had never been duly served, a receiver was refused.[3] But where the complainant swears in the verification that an execution has been issued, an ordinary affidavit, upon a motion before answer, denying that fact is not sufficient to dissolve an injunction.[4] And where the cause of the failure of the remedy at law is due entirely to the neglect or refusal of the officers of the court to perform their duties, such failure will not justify the appointment of a receiver.[5]

Before a receiver can be appointed in proceedings by a judgment creditor "it is absolutely necessary that the creditor should have exhausted all legal remedies, and it is absolutely necessary that he should have caused execution to issue upon his judgment and that such execution should have been returned unsatisfied in whole or in part. * * * The issuance and return of execution unsatisfied is regarded as the best evidence that the creditor has in good faith exhausted his remedy at law." It was held that the execution should be issued to the county of the defendant's residence, as it is there his property is supposed to be; or there must be a showing of exceptional facts to excuse such failure.[6]

Section 616. **Miscellaneous Objections to the Appointment.** — It has already been shown that the failure to serve the de-

Wis. 499; for the reason that, under an execution sale, the debtor's right of redemption would be better secured.

[1] Starr v. Rathbone, 1 Barb. 70.

[2] Condon v. Lee, 3 Edw. Ch. 304.

[3] Hart v. Tims, 3 Edw. Ch. 226. A motion for a receiver, upon a bill, after service of the subpœna but before service of the bill, was said to be contrary to the usual practice, and costs were refused to both parties.

[4] Strange v. Langley, 3 Barb. Ch. 650.

[5] Thompson v. Allen County, 115 U. S. 550. In this case a judgment has been obtained against a county and a *mandamus* had been issued to compel the levy and collection of a tax to pay the same, but the officers refused to qualify or to act. *Cf.* Supervisors v. Rogers, 7 Wall. 175; Meriwether v. Garrett, 102 U. S. 472; Garrett v. City of Memphis, 5 Fed. Rep. 860.

[6] Minkler v. United States Sheep Co. (N. Dak.) 62 N. W. R. 594.

fendant with a copy of the bill is a good defence.[1] And where the suit had been begun against the debtor in his life time and he died pending the proceeding, the bill being revived against his representatives, a receiver will not be appointed, but the property of the decedent will be disposed of under the statute, so that any priority obtained by the filing of the bill will be lost.[2] A discharge in bankruptcy will not avail as a defence, where it appears that the judgment on which the bill was founded was obtained subsequently to such discharge, and that the defendant had not availed himself of it as a defence to the action;[3] nor is it a defence that the plaintiff has waived an answer upon oath.[4]

The pendency of a motion for leave to amend the bill is no objection to a motion for a receiver, provided the defect in the bill is not fatal or such as to render the bill demurrable.[5] A receiver will be refused where the objection is raised that the bill does not allege that the execution was directed to the sheriff of the county where the defendant then resided,[6] but the failure of the plaintiff to give his residence, or abode, in the bill is a good objection.[7]

Section 617. **Of the Return of the Execution.**—The authorities are not agreed upon the question whether the receiver will be appointed on a creditor's bill where the execution is returned before the legal return-day. It has been held that the full period must elapse, and that it is not material whether the return is made voluntarily or at the request of the creditor. This rule proceeds upon the theory that the remedy at law must be fully and fairly exhausted

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[1] Hart v. Tims, 3 Edw. Ch. 226. *Cf.* Austin v. Figueira, 7 Paige, 56, where a receiver was allowed before answer, notice having been given of the application.

[2] Sylvester v. Reed, 3 Edw. Ch. 296; Mathews v. Neilson, Id. 346. In this case there is a dictum to the effect that the rule would be otherwise if a receiver had been appointed and he had obtained possession. *Cf.* Nicoll v. Boyd, 90 N. Y. 516.

[3] Steward v. Green, 11 Paige, 535. In this case the defendant had appeared in the bankruptcy proceedings and had made various defences. *Cf.* Gibson v. Gorman, 44 N. J. Law, 325.

[4] Root v. Safford, 2 Barb. Ch. 33.

[5] Barnard v. Darling, 1 Barb. Ch. 76. In this case the motion was directed to stand over pending a motion to set aside the judgment.

[6] Williams v. Hogeboom, 8 Paige, 469. No costs were allowed and the complainant was directed to amend and then renew his application.

[7] Howe v. Harvey, 8 Paige, 73. The reason given is that the court and the defendant may know where to resort to compel obedience to the order or process of the court, and for the payment of costs or to punish for improper conduct. In this case the motion was denied unless the complainant should amend his bill within twenty days, or file a bond for costs and give notice to the defendant's solicitor.

before resort to a court of equity, and that the fact of no property found at some time prior to the return-day, will not justify the presumption that none can be found before the time shall fully expire.[1] But other courts take a different view;[2] and it has been held that a receiver may be appointed upon a creditor's bill found upon a judgment against joint debtors, where only one was served with process and the sheriff returned that the defendants had no property, although it did not appear from the return that there might not be separate property.[3] An irregularity in the return of an execution into the office of a wrong clerk, if it were issued upon a valid judgment, cannot be insisted upon in a court of chancery as a ground for resisting an application for a receiver upon a creditor's bill founded upon the judgment, even if a court of law would notice the irregularity upon an application to set aside the return.[4]

Section 618. **Relief will be Granted Only to Lien Creditors.**— It is the general rule that equity will not interfere with the possession and control of the property of the debtor, by appointing a receiver in favor of general contract creditors, and that the creditor must first reduce his claim to judgment.[5] Hence, a receiver will not be appointed on a bill filed by a creditor before judgment, which alleges that the defendant has made fraudulent transfers and mortgages.[6] And a judgment *pro confesso* on valid claims in favor

[1] Thayer v. Swift, Harring. (Mich.) 430; Steward v. Stevens, Id. 169; Smith v. Thompson, Walk. (Mich.) 1; Williams v. Hubbard, Id. 28; Beach v. White, Id. 495. *Cf.* Cassidy v. Meacham, 8 Paige, 311; Beck v. Burdett, 1 Id. 305; McElwain v. Willis, 9 Wend. 546.

[2] Williams v. Hogeboom, 8 Paige, 469; Bowen v. Parkhurst, 24 Ill. 257.

[3] Austin v. Figueira, 7 Paige, 56. The receivership covered the joint properties and the separate property of the defendant served with process.

[4] Clark v. Dakin, 2 Barb. Ch. 36.

[5] Uhl v. Dillon, 10 Md. 500; Nusbaum v. Stein, 12 Id. 315; Hubbard v. Hubbard, 14 Id. 356; Rich v. Levy, 16 Id. 74; May v. Greenhill, 80 Ind. 124; Bayaud v. Fellows, 28 Barb. 451; Adee v. Bigler, 81 N.Y. 349; Johnson v. Farnum, 56 Ga. 144; Dodge v. Pyrolusite Manganese Co. 69 Id. 665. *Cf.* Blondheim v. Moore, 11 Md. 365; Wiggins v. Armstrong, 2 Johns. Ch. 144; Holdrege v. Gwynne, 18 N. J. Eq. 26; Young v. Frier, 9 Id. 465; Phelps v. Foster, 18 Ill. 309; Bigelow v. Andress, 31 Id. 322; Rhodes v. Cousins, 6 Rand. (Va.) 188. *Contra*, Rosenberg v. Moore, 11 Md. 376; Wachtel v. Wilde, 58 Ga. 50; Morrison v. Shuster, 1 Mackey, 190; Kehler v. Jack Manufacturing Co. 55 Ga. 639.

[6] Hulse v. Wright, Wright (Ohio), 61; Rich v. Levy, 16 Md. 74; Nusbaum v. Stein, 12 Id. 315. But see *contra*, Haggarty v. Pittman, 1 Paige, 298, where the bill alleged insolvency, and an assignment to an insolvent who was also a creditor; Rosenberg v. Moore, 11 Md. 376, where a portion of the debtor's property was alleged to be in imminent danger from having been assigned in trust for creditors to a notoriously insolvent and worthless person; Cohen v. Meyers, 42 Ga. 46, and Thompson v. Differdorfer, 1 Md. Ch. 489, cases of fraudulent transfers.

of certain creditors will not warrant a receiver in aid of another contract creditor.[1] But, under a statutory modification of the rule, receivers have been appointed in favor of creditors of a partnership suing in behalf of themselves and all other creditors, where the indebtedness is undisputed.[2] Where a vessel has been libelled in the United States court and taken possession of by a marshal, a state court appointed a receiver upon the motion of a mortgagee, to the end that all other claimants, including several mortgagees and judgment creditors, might be protected and for the purpose of obtaining and distributing any surplus after the claims of the libellants had been satisfied.[3] In New York, a receiver of the property of a corporation, foreign or domestic, can not be appointed upon the filing of a bill by a creditor at large, on behalf of himself and all others similarly situated.[4]

Section 619. **Of Receivers in the Interest of the Holders of Equitable Liens.** — A court of equity will, in general, appoint a receiver in the interest of the owner of an equitable lien upon the property of a debtor, and upon this ground, where a complainant shows a lien which can not be enforced at law, a receiver may be appointed.[5] Thus, where certain persons had been given an assignment of the freight to be earned by a vessel and also of the lien and interest of the master therein, in return for money advanced for the repair of the vessel, and it was shown that the owners were insolvent and that a receiver was necessary in order to secure the lien, the court held it a proper case for the appointment of a receiver.[6] And a judgment creditor was allowed a receiver of the crops of a plantation carried on in the name of another, in an action to subject the debtor's interest therein to the satisfaction of his judgment.[7] And where a creditor had an annuity charged upon real property which was in arrears, and he was without legal relief, he was allowed a receiver until the arrears were paid up.[8] So also, a receiver of a living has been appointed, in favor of a judgment creditor of the incumbent.[9]

[1] McGoldrick v. Slevin, 43 Ind. 522.

[2] Mott v. Dunn, 10 How. Pr. 225; La Chaise v. Lord, Id. 461; Levy v. Ely, 15 Id. 395; Jackson v. Sheldon, 9 Abb. Pr. 127.

[3] Thompson v. Van Vechten, 5 Duer, 618.

[4] Lehigh Coal & Navigation Co. v. Central R. R. Co. 43 Hun, 546.

[5] Bloodgood v. Clark, 4 Paige, 574.

[6] Sorley v. Brewer, 18 How. Pr. 276.

[7] Micou v. Moses, 72 Ala. 439. The proof in this case showed that the property was being rapidly disposed of, and there were evidences of fraud.

[8] Sankey v. O'Maley, 2 Moll. 491; Taylor v. Emerson, 4 Dru. & War. 117.

[9] Hawkins v. Gathercole, 31 Eng. L. & Eq. 305; s. c. 1 Sim. (N. S.) 63.

Section 620. **Of Receivers in Cases of Assignment for the Benefit of Creditors.** — A receiver is frequently appointed in the interest of creditors under an assignment made by a debtor for their benefit. Thus, a receiver has been allowed where the assignee or trustee refused to execute the trust imposed upon him;[1] and also, where, having accepted the trust, the assignees so mismanaged the property and neglected their duties that there was danger of the waste or diversion of the property;[2] and in another case where an assignee of real estate which was to have been sold and the rents and proceeds applied in payment of certain debts, remained in possession for several years without paying any debts.[3]

Section 621. **Of Receivers as Against Chattel Mortgagees.** — It sometimes happens that the equities of general and unsecured creditors are such that a receiver will be appointed as against a mortgagee of chattels, and in a proper case the relief may be granted as well against a mortgagee in possession as against one out of possession. Thus, where a mortgagee in possession had sold a portion of the property, and as to the remainder stood in the relation of trustee for the other creditors, a receiver was appointed, where the mortgagee was about to dispose of the property in his hands to the prejudice of a judgment creditor.[4] And where all the available property of the debtor was claimed to be covered by a mortgage, and was more than sufficient to pay the mortgage debt, a receiver was allowed upon a bill alleging that a portion of the property was not affected by the mortgage, and that the debtor, who was in possession, was disposing of it with the permission of the mortgagee.[5] But an attaching creditor was refused a receiver where the debtor had executed a mortgage in favor of certain other creditors whose claims were in amount about equal in value to the property mortgaged.[6]

Section 622. **Of Receivers in Cases of Fraudulent Assignments and Transfers.** — Receivers are frequently appointed in

[1] Suydam v. Dequindre, Harring. (Mich.) 347.

[2] Jones v. Dougherty, 10 Ga. 273.

[3] Malcolm v. Montgomery, 2 Moll. 500. The assignee in this case was without jurisdiction of the court, and, as he had not appeared, the receivership was granted until answer filed.

[4] Gouthwaite v. Rippon, 8 L. J. (N. S.), Ch. 139.

[5] Rose v. Bevan, 10 Md. 466.

[6] Silverman v. Kuhn, 53 Iowa, 436. The application in this case was under a statute permitting receivers to be appointed where the property is in danger of being lost or materially injured or impaired, which elements the applicant did not prove to exist.

cases of assignments of property by a debtor where it appears that such assignments are made to hinder, delay or defraud creditors. Thus, where a fraudulent assignment was made to an insolvent assignee the assignor continuing in possession, a receiver was appointed;[1] but if the assignee is responsible the relief may be refused.[2] And if the property has come into the possession of the assignee, the court will not determine his title upon the application for the receiver, unless he is made a party thereof.[3] And where a debtor, while heavily in debt, disposed of large amounts of stock and could not satisfactorily account for the transfers, a receiver was appointed in order to bring actions to determine what had become of the property, and that too, notwithstanding the debtor denied the allegations of bad faith.[4]

It seems that creditors, as such, may institute suits to set aside fraudulent transfers of property and, if the transfers be set aside, they may either levy execution thereon or have a receiver appointed to sell and convey the property for their benefit.[5] A receiver may also be appointed where a defendant is disposing of his property with the intent to evade a decree of the court directing him to pay over certain funds;[6] but an assignee of a term is not entitled to a receiver as against the owner of the remainder, pending a suit to set aside as fraudulent the conveyance of the remainder.[7]

Section 623. **Of Priorities.** — Where a receiver of real property, or of the rents and profits thereof, has been appointed, it is a settled rule that judgments recovered subsequently to the appointment do not become liens thereupon. Hence, if a sheriff sell real property under such a judgment, no title will pass, but the title of a purchaser from the receiver will have precedence.[8] Upon the same principle, a receiver appointed in a judgment creditor's suit, can hold the debtor's choses in action in preference to one who

[1] Connah v. Sedgwick, 1 Barb. 210.

[2] Goodyear v. Betts, 7 How. Pr. 187. In this case the allegations of insolvency were upon information and belief, and were denied.

[3] Journeay v. Brown, 26 N. J. Law, 111.

[4] Strong v. Goldman, 8 Biss. 552.

[5] Walker v. White, 36 Barb. 592; Shand v. Hanley, 71 N. Y. 319.

[6] Shainwald v. Lewis, 7 Sawyer, 148.

[7] Huerstel v. Lorillard, 7 Robert. (N. Y.) 251; s. c. 6 Id. 260. In this case the original lessor entered into certain covenants which he failed to keep, on account of which the tenant refused to take possession. The interest of the lessor was subsequently assigned to plaintiff and the premises sold by the original lessor to a third person, which latter conveyance was claimed to be fraudulent. It seems that the assignee had recovered a judgment against his assignor on certain guarantees.

[8] Chautauqua County Bank v. White, 6 N. Y. 236. *Cf.* Chautauqua County Bank v. Resley, 19 Id. 369; Wiswall v. Sampson, 14 How. 52.

purchased them of the debtor and paid for them, after notice of the filing of the bill, and after attempts had been made, but without much diligence, to serve the subpœna.[1]

Where the land is incumbered by a mortgage, the mortgagee is entitled to be paid the accrued interest out of the funds in the hands of the receiver;[2] and if the debtor held as lessee the same rule applies as against the landlord's claim for rent.[3] A receiver will not be discharged by consent of the creditor upon whose bill he was appointed where there are prior creditors whose rights may be protected by the continuance of the receivership, but such other creditors may be required to file their bills without unreasonable delay.[4] And the fact that a receiver has been appointed in the interest of a mortgagee of the rates and tolls of a corporation, will not prevent a subsequent judgment creditor from issuing an *elegit* without prejudice to the rights of such receiver.[5] Furthermore, as between two creditors, upon general equity principles, the more diligent, or he who first obtains a receiver, is entitled to a priority in the distribution of the fund.[6] So also a priority will be given to the creditor who first obtains possession of, or a lien upon, the property of the debtor, irrespective of the date of the judgments.[7]

But where the receiver has in his possession a fund upon which certain judgment creditors claim a lien, the court will not direct the appropriation of it in payment of those claims, there being other creditors, without notice to such other creditors of the application.[8] Nor will the court, by a summary rule, direct the receiver to pay the claims of certain attaching creditors, where the receiver was appointed upon a creditor's bill filed subsequently to the attachment; but the order will be granted only upon a hearing where the respective priorities can be determined.[9]

Section 624. **Of the Powers and Duty of the Receiver Herein.**— In general the power of receivers in equity are such only as are conferred upon them by the order of their appointment and the prac-

[1] Weed v. Smull, 3 Sandf. Ch. 278.

[2] Holland v. Cork & Kinsale Ry. Co. Ir. Rep. 2 Eq. 417.

[3] Riggs v. Whitney, 15 Abb. Pr. 388.

[4] Murrough v. French, 2 Moll. 497.

[5] Potts v. Warwick & Birmingham Canal Nav. Co Kay, 142.

[6] Parks v. Sprinkle, 64 N. C. 637; Pullis v. Robinson, 73 Mo. 201; Peteng v. Hoskins, 12 Lea (Tenn.), 107. *Cf.* George v. Williamson, 26 Mo. 193. United States Bank v. Burke, 4 Blackf. (Ind.) 141; Hills v. Sherwood, 48 Cal. 393; Corning v. White, 2 Paige, 567.

[7] Bates v. Brothers, 2 Sm. & G. 509. *Cf.* Field v. Sands, 8 Bosw. 685.

[8] Hubbard v. Guild, 3 Duer, 685. It was held also that such creditors might be directed to institute an action against the receiver to establish their claims.

[9] Lowe v. Stevens, 66 Ga. 607.

tice of the court.[1] The receiver in a creditor's action may pursue, by a suit in equity in his own name, funds of the debtor which have been fraudulently disposed of, and this without regard to the fact that the creditor might, under an amended bill, have done the same thing; the assent of the creditor to such a proceeding is merely to secure him as to costs.[2]

In a suit by a receiver the defendant cannot be allowed to set off any claims or judgments existing in his favor against the debtor, but he must pay to the receiver all he owes and then look to the receiver, upon a distribution, for claims held by him; any other rule, it is plain, would give him a preference.[3] Where a receiver was appointed in a creditor's suit, and thereafter the debtor made a general assignment of all his property to the receiver, reciting therein the proceedings, it was held that the receiver might file a bill in another state to foreclose a mortgage, or to enforce a right of redemption in lands in such other state, but that, in such a case, he brings his action not strictly as receiver, but rather as an assignee at law.[4] But it has been held, in New York, that a receiver of an insolvent corporation, appointed in a creditor's suit, cannot, by virtue of the appointment, maintain a suit in equity to recover of a stockholder the balance of his unpaid subscription.[5] And a receiver appointed by a United States court in one district cannot sue to enforce the liability of a surety in another district, in as much as he has no extra-territorial jurisdiction.[6]

Upon the appointment of a receiver in a creditor's suit, the defendant is not entitled to the rents and profits of his real estate

[1] Verplanck v. Mercantile Insurance Co. 2 Paige, 452. See also, *passim*, the chapter upon the Rights and Powers of Receivers, *supra*.

[2] Green v. Bostwick, 1 Sandf. Ch. 185.

[3] Clark v. Brockway, 3 Keyes, 13; s. c. 1 Abb. Ct. App. Dec. 351. It is to be observed that the receiver in this case was appointed in a suit brought by a creditor after a decree setting aside, as fraudulent, an assignment for the benefit of creditors. It does not clearly appear whether the receiver was appointed in aid of the particular creditor, or was a general receiver for all creditors.

[4] Graydon v. Church, 7 Mich. 36. It was further held in this case that it was for the court appointing the receiver to hold him accountable for the property, especially if all the parties resided within its jurisdiction and had not appealed to the other court.

[5] Mann v. Pentz, 3 N. Y. 415. Here the defendant had paid all calls and no other stockholders were joined in the suit. *Cf.* in general, Angell v. Silsbury, 19 How. Pr. 48. See further in the following chapter, a full discussion of the receiver's power to sue in these cases.

[6] Brigham v. Luddington, 12 Blatchf. 237. In this case it is further held that a statute of the state wherein the receiver was appointed giving him title and power to sue, cannot affect the United States courts, or enlarge their jurisdiction, because the receiver is appointed by virtue of the equity power of the courts of the United States.

during the time allowed for a redemption from a sale on execution, but they go to the receiver immediately.[1] And in a suit by a receiver, the debtor can not set up, as a defence, that the transfer to the receiver is voidable as against creditors other than the one upon whose motion the appointment was made.[2] In England, when a receiver is appointed upon the application of creditors who have instituted proceedings in bankruptcy, he acts in the interests of all the creditors, and can not make a valid payment to any creditor in preference to others.[3]

"The receiver in a creditor's suit is appointed to take the property of the judgment debtor and dispose of it and apply the proceeds in satisfaction of the judgment under the direction of the court."[4]

A receiver appointed under a creditor's bill, not filed in behalf of all the creditors, is not necessarily a trustee for all the creditors, but for the benefit of the one in whose behalf he is appointed. The primary duty of such a receiver in such a proceeding is to apply the funds realized from the property of the debtor in satisfaction of the judgment forming the basis of the bill.[5]

Section 625. **Of the Control of the Receiver by the Court.** — The receiver being an officer of the court appointing him, is subject to its control in all matters not wholly discretionary. The court having the power to appoint, has also the power, in a proper case, to restrain, suspend or remove the receiver. Thus, where a receiver had been appointed in a creditor's suit for the enforcement of a judgment amounting to one thousand dollars, and property to the value, according to the debtor's affidavit, of sixty thousand dollars was assigned to him, he immediately advertised the entire property for sale at auction, the court directed a stay.[6] The court will also, limit the amount of property of which a receiver may take possession, and this amount may be increased from time to time as the right of subsequent creditors may determine.[7] And where a judgment had been recovered upon a bond, and a bill was filed thereupon as though all were due, when in fact only the interest was due, the court restricted the receiver to the amount of the interest.[8] So also, where the receiver takes title to real property,

[1] Farnham v. Campbell, 10 Page, 598.
[2] Naglee v. Lyman, 14 Cal. 451.
[3] *Ex parte* Jay, L. R. 9 Ch. App. 133.
[4] Atkinson v. Foster, 27 Ill. App. 63.
[5] Young v. Clapp, 147 Ill. 176.
[6] Wardell v. Leavenworth, 3 Edw. Ch. 244; the property in this case was mining stock the value of which was unknown to the receiver.
[7] Corbet v. McMahon, 2 Jo. & Lat. 671.
[8] Ryerson v. Minton, 3 Edw. Ch. 382.

the court will not, without leave first obtained, permit it to be sold under any judgment other than the one for the enforcement of which the receiver was appointed.[1] Where a receiver was appointed by the chancellor and subsequently his authority was extended by a vice-chancellor, it was held, in New York, that all directions as to the distribution of the fund must come from the chancellor.[2] And where a decree was made directing the payment of the creditor's claim by the administrator out of certain assets, and ordering the receiver also to pay out of assets which should come into his hands, an injunction was issued to restrain the receiver from paying money to the agent of a creditor without the direction of the administrator.[3]

Upon the appointment of a receiver the title of the property of the debtor vests, to all intents and purposes, in the court; and it is not affected by the death either of the debtor or of the receiver, and if the receiver die the court may appoint a new receiver to take the property.[4] And the representatives of the deceased receiver, or trustee, may be required to come in and account for moneys and other property in the hands of the decedent.[5]

II.

RECEIVERS IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

Section 626. **Introductory.** — The jurisdiction of a court of equity to appoint a receiver in behalf of a judgment creditor, as has already appeared, has been long well established. Lord Eldon declared that it was in his day an ancient rule where a judgment creditor found upon the issue of his execution, that the debtor's estate was protected in such a way by circumstances respecting a prior title, that the judgment could not be enforced, that he might apply for a receiver, and that the fact that the creditor could not, at law, obtain satisfaction of his judgment, was sufficient to entitle him to a receiver of his debtor's estate.[6] When the legal remedy is exhausted or is inadequate, it is a fundamental principle that equity may

[1] Wiswell v. Sampson, 14 How. 52.

[2] Burrell v. Leslie, 6 Paige, 445. This rule is not founded on the higher authority of the chancellor, but on the fact that he made the appointment originally.

[3] Green v. Hambury, 2 Brock. 408. This was because the direction to the receiver was subordinate to the right of the administrator to determine the applicability of the assets.

[4] Nicoll v. Boyd, 90 N. Y. 516.

[5] Coombs v. Jordon, 3 Bland's Ch. 284.

[6] Curling v. Marquis Townshend, 19 Ves. 628.

be invoked. But in general, not only in New York, but in other states which have adopted codes of procedure, the equitable remedy by a creditor's action has been essentially modified, or almost entirely superseded, by statutory proceedings supplementary to the return of the execution wholly or partially satisfied. We, therefore, proceed to a consideration of the law in relation to these statutory proceedings to subject the property of a judgment debtor to the payment of the judgment, having in the sections immediately preceding, considered the law relative to the earlier remedy by creditor's bill. If reference had been had to the relative practical importance and value of the two remedies at the present day, this order of treatment would have been reversed. The practice in this matter, it is believed, is in almost all the code states modeled largely after that in New York, where the law has been more fully developed and the details more completely worked out than elsewhere.

Section 627. **The New York Statute Authorizing the Appointment.** — The statute in New York which authorizes the appointment of a receiver in proceedings supplementary to execution, is as follows: "At any time after making an order, requiring the judgment debtor, or any other person, to attend and be examined, or issuing a warrant, as prescribed in article first of this title, the judge to whom the order or warrant is returnable may make an order, appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he can not, with reasonable diligence, be found within the state; in which case, the order must recite that fact, and may dispense with notice, or may direct a notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him."[1]

In some states it is provided that the sheriff or other person may be appointed receiver; in others the judgment creditor may be authorized to bring an action to determine the title of property claimed to belong to the debtor, and, at the same time, the person in possession will be restrained from interfering with it. In all cases the receiver is an officer of the court.

[1] N. Y. Code of Civil Proc. section 2464.

Section 628. **When the Appointment will be Made.** — The rules governing the appointment of a receiver in supplementary proceedings look, in general, somewhat more to the interests of the creditor than those which regulated the appointment under the former creditors' suit. It is usually the rule in these cases that, wherever property of the debtor is discovered which can not be reached by the levy of execution or by a summary order, a receiver must be appointed or, if one have already been appointed, that the receivership will be extended so as to enable the receiver to take possession of the newly discovered property.[1] It has even been held in these cases a matter of course to appoint a receiver.[2] Thus, where there are debts and claims due, or rights of action or equitable interest belonging to the debtor, a receiver must be appointed in order to reduce such assets to possession, and to apply them to the satisfaction of the judgment; or if the title or right of possession of the debtor be disputed, or adverse claims to the property discovered are made by a third person, or the property is claimed to be exempt by law from execution, or the indebtedness is denied by the defendant, the appointment of a receiver is the only proper proceeding.[3] And where the wife of the debtor was examined as a witness, and testified that certain funds in a bank standing in the debtor's name were her property, a receiver was allowed pending a suit to try the title to the money.[4] In New Jersey, the appointment is largely a matter of discretion, and if the evidence shows no property or only property exempt, it should not be made; but the rule is otherwise in a case of contested rights, or where there is reasonable ground for believing that there is property which can be reached;[5] and, on appeal, the court will not review the evidence further than to determine whether it was sufficient to authorize the appointment.[6] Sometimes a receiver has been appointed where property was discovered which was not exempt, but which could not be reached by an order for its application to the judgment;[7] so also, where third persons or corporations were alleged to be indebted, or to have

[1] Coates v. Wilkes, 92 N. C. 376; Dilling v. Foster, 21 S. C. 335; Flint v. Webb, 25 Minn. 263; Spencer v. Cuyler, 9 Abb. Pr. 382; People v. Mead, 29 How. Pr. 360.

[2] Myers' Case, 2 Abb. Pr. 476.

[3] Bunacleugh v. Poolman, 3 Daly, 236; Dickinson v. Onderdonk, 18 Hun, 479; Rodman v. Henry, 17 N. Y. 482; People v. Hulburt, 5 How. Pr. 446.

[4] Ormes v. Baker, 17 N. Y. Weekly Dig. 104.

[5] Colton v. Bigelow, 41 N. J. Law, 266.

[6] Journeay v. Brown, 26 N. J. Law, 111.

[7] Flint v. Webb, 25 Minn. 263. In this case it was held that the appointment might be made at the same time that the order was granted.

property belonging to the defendant, although the allegations were denied or the property was claimed adversely.[1] And where the property disclosed consisted of notes of an insolvent firm and an interest in an existing firm of which the defendant was a member, a receiver was allowed.[2] It is no answer, upon a motion for a receiver, where property is discovered or transactions are disclosed which are *prima facie* fraudulent, that the property can be reached by execution, or the title tested by an action in the nature of replevin;[3] nor that the defendant offered to deliver to the sheriff sufficient property to satisfy the judgment;[4] nor that the property discovered — as, for example, choses in action — is of no value;[5] nor that the property discovered is an equity of redemption, heavily mortgaged, which the defendant has been willing to have sold, the right of redemption being preserved.[6]

In New York, a receiver may be appointed in a proceeding upon a judgment in favor of the people recovered against a domestic corporation.[7] And in some states it has been held that the appointment of a receiver does not prevent the judgment creditor, upon whose motion the appointment was made, from maintaining an action to set aside as fraudulent a mortgage prior to his lien.[8]

In supplementary proceedings a receiver may be appointed though the only property disclosed is an interest in real estate situated in another state; and the debtor may be required to convey such interest to the receiver.[9]

Section 629. **When a Receiver will Not be Appointed.**— A receiver will not be appointed where the property discovered is a freehold estate, it not appearing that an execution has been issued and returned unsatisfied since the property was acquired by the debtor. This is upon the ground that there is a sufficient remedy

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[1] Knight v. Nash, 22 Minn. 452. The receiver in this case was authorized to collect a debt from a municipal corporation.

[2] Webb v. Overmann, 6 Abb. Pr. 92.

[3] Todd v. Crooke, 4 Sandf. Super. Ct. 694; Heroy v. Gibson, 10 Bosw. (N. Y.) 591. *Cf.* Dollard v. Taylor, 33 N. Y. Super. Ct. 496.

[4] Balde v. Smith, 5 Ch. Sent. 11.

[5] Webb v. Overmann, 6 Abb. Pr. 92.

[6] Bailey v. Lane, 15 Abb. Pr. 373 (n). This case has been so far overruled that now a receiver cannot be appointed to sell in such a way as to cut off the right to redeem.

[7] N. Y. Code Civ. Proc. section 2463.

[8] Gere v. Dibble, 17 How. Pr. 31. In this case the receiver was made a party defendant, and the complaint contained an allegation charging him with neglect. *Cf.* Dollard v. Taylor, 33 N. Y. Super. Ct. 496; Potts v. Warwick & Birmingham Canal Navigation Co. Kay, 142. See for the old practice, Seymour v. Wilson, 16 Barb. 294; Hayner v. Fowler, 16 Id. 300.

[9] Towne v. Campbell, 35 Minn. 231.

at law.[1] And in general, whenever the property discovered can be reached by execution, no receiver will be allowed;[2] but the return of the execution unsatisfied is usually held to present a sufficient *prima facie* case for a receiver, and where the only property, other than trust funds which could not be reached, consisted of judgments in favor of the debtor against the creditor, and there had been an offer of a set-off, a receiver was refused, because the satisfaction of the judgment had been prevented by acts of the creditor, and, further, that the appointment would tend to harass and disturb the defendant.[3] So also, where the object of the application is to have the receiver attack an assignment as fraudulent, which the judgment creditor could do, it is improper to grant the application.[4] A receiver of the property of a corporation, domestic or foreign, will not be appointed upon the filing of a bill by a creditor at large, on behalf of himself and all others similarly situated.[5] And generally supplementary proceedings are limited to judgments against natural persons.[6]

In Illinois, the courts are in doubt whether the relief should be allowed where the bill contains no distinct allegations of fraud, and it does not appear affirmatively that the debtor has some interest in specified property or choses in actions, which can, in this way, be subjected to the satisfaction of the judgment.[7]

In supplemental proceedings a receiver will not be appointed unless it appears that such is necessary for the preservation of the property.[8]

Section 630. **Of the Return of the Execution.** — Formerly it was the rule that a receiver could not regularly be appointed until an execution had been issued and returned unsatisfied. This followed the old rule in equity, that the remedies at law must first be exhausted.[9] Accordingly, upon the application for a receiver, the affidavit of the defendant that no execution had been returned, was deemed a sufficient answer,[10] and the same rule was extended to

[1] Bunn v. Daly, 24 Hun, 526; Ashley v. Turner, 22 Id. 226; Tinkey v. Langdon, 60 How. Pr. 180; Petition of Inglehart, 1 Buffalo Super. Ct. 514.

[2] Second Ward Bank v. Upmann, 12 Wis. 499; Petition of Inglehart, 1 Buffalo Super. Ct. 514.

[3] De Camp v. Demsey, 10 N. Y. Civ. Proc. Rep. 210.

[4] Dollard v. Taylor, 33 N. Y. Super. Ct. 496. *Cf.* Gere v. Dibble, 17 How. Pr. 31.

[5] Lehigh Coal & Navigation Co. v. Central R. R. Co. 43 Hun, 546.

[6] Connor v. Todd, 5 Cent. Rep. (N. J.) 61.

[7] Compare the opinions in First National Bank v. Gage, 79 Ill. 207, and Gage v. Smith, Id. 219.

[8] Rodman v. Harvey, 102 N. C. 1.

[9] Darrow v. Lee, 16 Abb. Pr. 215.

[10] Wright v. Strong, 3 How. Pr. 112.

proceedings against third persons before the return.[1] But the sheriff was not required to retain the execution for the full period allowed by law, and if an earlier return was not the result of collusion with the debtor with the intent to prevent a levy, it was valid.[2] In New York, however, there is a statute which provides for the appointment of a receiver in proceedings instituted before the return of the execution, and also in proceedings against third persons.[3] And in Wisconsin, under the provisions of the code of procedure, the court may appoint a receiver where the sheriff's return of *nulla bona* was made and signed before the supplementary proceedings were instituted, although the execution was not lodged with the clerk until afterwards.[4]

Section 631. **Of the Jurisdiction to Make the Appointment.** — In New York the statute authorizes the judge to whom the order instituting the proceedings is returnable, to appoint the receiver,[5] and this may be done without the usual affidavit if the debtor voluntarily appear and submit to the examination, or consent to the receiver.[6] In other states the resident judge, or one assigned to the district or holding the courts there,[7] or a county judge possessing civil jurisdiction but no general equity powers may appoint;[8] but a clerk of the court or a commissioner can not.[9] The appointment may be made at any stage of the proceedings when property is discovered which will justify the appointment,[10] and the application being summary may be made immediately at the end of the examination, the defendant being present in person or by attorney.[11] The order appointing a receiver is, in New York, made

[1] Holbrook v. Orgler, 40 N. Y. Super. Ct. 33; s. c. 49 How. Pr. 289; Andrews v. Glenville Woolen Co. 11 Abb. Pr. (N. S.) 78. *Contra*, Hanson v. Tripler, 3 Sandf. Super. Ct. 733; Union Bank v. Sargeant, 53 Barb. 422; s. c. 35 How. Pr. 87.

[2] Tyler v. Willis, 33 Barb. 327. But see *contra*, Spencer v. Cuyler, 9 Abb. Pr. 382.

[3] N. Y. Code of Civil Proc. section 2464; De Vivier v. Smith, 6 N. Y. Civil Proc. Rep. 394; s. c. 1 How. Pr. (N. S.) 48.

[4] Barker v. Dayton, 28 Wis. 367, where it further appears that such a receiver may maintain an action to set aside a fraudulent conveyance of real estate by the defendant, which was made to defeat the recovery of anything upon the judgment.

[5] Smith v. Johnson 7 How. Pr. 39.

[6] Bingham v. Disbrow, 37 Barb. 24; s. c. 14 Abb. Pr. 251.

[7] Corbin v. Berry, 83 N. C. 27.

[8] Second Ward Bank v. Upmann, 12 Wis. 499.

[9] Parks v. Sprinkle, 64 N. C. 637; Clark v. Bergenthal, 52 Wis. 103.

[10] N. Y. Code Civil Proc., section 2464; Groot v. Greeley, 5 N. Y. Month. Law Bull. 69; People v. Mead, 29 How. Pr. 360; Coates v. Wilkes, 92 N C. 376; Flint v. Webb, 25 Minn. 262.

[11] Todd v. Crooke, 4 Sandf. Super. Ct. 694.

at chambers and must be filed in the county clerk's office.[1] The judge may appoint a receiver or direct the property to be transferred or conveyed to him. The former is the proper proceeding where the title is disputed,[2] and a third person claiming title or right of possession may be restrained from disposing of the property until the determination of a test suit.[3]

Section 632. **Of Notice of the Application.**—The statutes providing for supplementary proceedings generally require notice of an application for a receiver to be given to the defendant,[4] but if the application be made when the defendant is present, either in person or by attorney, no other notice is necessary; if, however, the examination were before a referee, a notice must be given.[5] If the defendant were ordered to present himself for examination, but made default, and witnesses were examined, a receiver may be appointed without further notice.[6] The notice is equally necessary if the defendant be a non-resident;[7] but provision is generally made by statute for a substituted service where the defendant can not be served personally;[8] so, also, where the proceedings are against third persons.[9] Verbal notice is insufficient, it must be in writing.[10]

If the defendant serve a notice of motion to vacate, a counter-notice may be served of a motion for a receiver in case the defendant's motion prevail.[11] The length of time required for the notice and the mode of service are regulated by local statutes.

Section 633. **Of Irregularity or Fraud in the Appointment.**—The defendant may, as of course, question the regularity of the ap-

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[1] Ball v. Goodenough, 37 How. Pr. 479; N. Y. Code Civil Proc., section 2467.

[2] Manice v. Smith, 5 N. Y. Weekly Dig. 255.

[3] Manice v. Smith, 5 N. Y. Weekly Dig. 255; Dewey v. Finn, 18 N. Y. Weekly Dig. 558.

[4] Clarke v. Savage, 5 N. Y. Weekly Dig. 198; Andrews v. Glenville Woolen Co. 11 Abb. Pr. (N. S.) 78; Vandeburgh v. Gaylord, 7 Weekly Dig. 136; Kemp v. Harding, 4 How. Pr. 178; Dorr v. Noxon, 5 Id. 29.

[5] Stohn v. Epstein, 6 N. Y. Civil Proc. Rep. 36, s. c. 14 Abb. N. C. 322; Todd v. Crooke, 4 Sandf. Super. Ct. 694; Heroy v. Gibson, 10 Bosw. (N. Y.) 591. In Dilling v. Foster, 21 S. C. 335, it was held that a receiver might be appointed upon the hearing of the referee's report without specific notice.

[6] Colton v. Bigelow, 41 N. J. Law, 266.

[7] Whitney v. Welch, 2 Abb. N. C. 442.

[8] New York Code Civ. Proc. section 2464.

[9] Morgan v. Von Kohnstamm, 9 Daly, 355; s. c. 60 How. Pr. 161.

[10] Ashley v. Turney, 23 Hun. 226.

[11] Clark v. Clark, 11 Abb. N. C. 683; Strohn v. Epstein, 6 N. Y. Civ. Proc Rep. 36; s. c. 14 Abb. N. C. 322.

pointment of the receiver, but if he does not raise that question at the outset, the objection will be deemed to have been waived, and can not be raised by a third person in a suit by the receiver.[1] This rule, upon the familiar principle that a want of jurisdiction may be suggested at any stage of a judicial proceeding, does not apply where the irregularity consists in want of jurisdiction,[2] or where the appointment was procured by fraud.[3]

Section 634. **Of Waiver of Irregularity.**—If a defendant appear and submit to an examination without objection, he is held to waive any irregularity in the issue of the order and even to waive an objection to the jurisdiction.[4] So, likewise, an irregularity in the appointment of a receiver is waived by an appearance without objection at the hearing,[5] or by appealing from the order of appointment;[6] and not to object seasonably is sometimes deemed a waiver.[7]

Section 635. **Who May be the Receiver.** — In general any disinterested party may be appointed the receiver in these cases. The rules which govern the appointment in other cases will usually apply at least by analogy. In New York, it has been held that the creditor himself at whose instance the appointment was made, may properly be selected as receiver provided he be not a non-resident.[8] In some jurisdictions an officer of the court, or the clerk, or a master in chancery is usually appointed, but, upon the other hand, the statutes often make exception of clerks of courts and their assistants and deputies. The matter, as in other cases, rests largely in the discretion of the judge, it being his duty in selecting a receiver to have an eye to the interest of all the parties concerned.

Section 636. **Of the Receiver's Bond.**— Before the receiver is authorized to act, he is, as in other cases, usually required to give a

[1] Tyler v. Willis, 33 Barb. 327; s. c. *sub. nom.* Tyler v. Whitney, 12 Abb. Pr. 465; Underwood v. Sutcliffe, 10 Hun, 453 (reversed on another point, 77 N. Y. 58); Powell v. Waldron, 89 N. Y. 328; Whittlesey v. Frantz, 74 N. Y. 456; Bangs v. Duckinfield, 18 Id. 592; Wright v. Nostrand, 94 Id. 31; Bacon v. Cropsey, 7 Id. 195; Dobson v. Pearce, 12 Id. 156; Morgan v. Potter, 17 Hun, 403; Hobart v. Frost, 5 Duer. 672; Oakley v. Becker, 2 Cowen, 454; Richards v. Allen, 3 E. D. Smith, 399; Green v. Bookhart, 19 S. C. 466. *Cf.* Jacobson v. Doty Plaster Manfg. Co. 32 Hun, 436; Barker v. Dayton, 28 Wis. 367.

[2] Tyler v. Willis, 33 Barb. 327; Richards v. Allen, 3 E. D. Smith, 399.

[3] Lottimer v. Lord, 4 E. D. Smith, 183.

[4] Bingham v. Disbrow, 37 Barb. 24.

[5] Underwood v. Sutcliffe, 10 Hun, 453.

[6] Tinkey v. Langdon, 60 How. Pr. 180.

[7] Union Bank v. Northrop, 19 S. C. 473.

[8] Chamberlain v. Greenleaf, 4 Abb. N. C. 92.

bond. A substantial compliance with the statute in this regard is sufficient and the courts do not favor technical objections.[1] Accordingly, while a bond without a seal is objectionable, advantage can be taken of it only by the defendant,[2] but if the statute require a bond with sureties, one with one surety and unsealed, is insufficient.[3] The objection, however, must be raised in the court which appointed the receiver,[4] and, in New York, the bond must be filed in the office of the clerk of the county where the proceedings are taken.[5]

Section 637. **Of Notice to Other Creditors.**— It is generally provided that notice of the application of the appointment of a receiver must be given to any other judgment creditors who are prosecuting special proceedings to obtain satisfaction of their judgments, the reason being to prevent the appointment of more than one receiver, but notice to creditors who have no action or proceeding pending is not required,[6] and even a failure to give the notice has been held not to operate to avoid the order appointing the receiver.[7] The character of the notice and the length of time required, are different in different jurisdictions and depend largely on local practice.[8]

Section 638. **In General only One Receiver can be Appointed.** — Following the equity rule, the statutes in these cases generally provide that only one receiver shall be appointed, and this is the rule without regard to the number of bills or proceedings pending against the debtor,[9] because one appointment completely divests the debtor of all his property. If it so happen that more than one receiver has been appointed, the one first appointed will be allowed to act and the other or others will be discharged and be required to account to him.[10] If an earlier receivership exist it will be extended

[1] Underwood v. Sutcliffe, 10 Hun, 453. In this case the date of the bond was earlier than the order of appointment, and it was held not a fatal irregularity.

[2] Morgan v. Potter, 17 Hun, 403.

[3] Johnson v. Martin, 1 Thomp. & C. (N. Y.) 504.

[4] Peters v. Carr, 2 Dem. (N. Y. Surrogate) 22. *Cf.* Lippincott v. Westray, 6 N. Y. Civ. Pro. Rep. 74.

[5] Fiske v. Twigg, 50 N. Y. Super. Ct. 69.

[6] Corning v. Glenville Woolen Co. 14 Abb. Pr. 339.

[7] Lottimer v. Lord, 4 E. D. Smith, 183; Corbin v. Berry, 83 N. C. 27.

[8] In New York eight days' notice of the motion is required. Leggett v. Sloan, 24 How. Pr. 479.

[9] Myrick v. Selden, 36 Barb. 15; Kellogg v. Coller, 47 Wis. 649. *Cf.* State Bank v. Gill, 23 Hun, 410.

[10] Deming v. New York Marble Co. 12 Abb. Pr. 66; Lottimer v. Lord, 4 E. D. Smith, 183; Parks v. Sprinkle, 64 N. C. 637.

so as to comprise the later proceeding, but the laches of the creditor, or of the first receiver, may be such as to justify his displacement in favor of a second.[1]

A somewhat different rule prevails in the United States courts on account of their independent jurisdiction. In those courts a second receiver will be appointed although there be one already appointed by a state court, upon the theory that this will prevent confusion and conflict.[2] Where two or more receivers are separately appointed, although at the instance of different creditors, they represent the same estate and take all the property of the debtor, and are, therefore privies in estate and in law.[3] The order appointing the receiver must generally be filed and recorded in order to give notice to subsequent purchasers and incumbrancers.

Section 639. **Of the Title of the Receiver Herein — May Attack Fraudulent Conveyances.**— It is a well established rule of law that, as to all the property and rights of property of the judgment debtor and as to all lawful transactions with his property and rights of property, the receiver stands only in the place of the judgment debtor, and has no rights in respect thereto which the latter did not have.[4] But as to property which the judgment debtor has transferred or disposed of in fraud of the creditor in whose behalf the receiver was appointed, such receiver acquires more than the property and rights of property which the judgment debtor owned at the date of the appointment, namely the right to impeach these transfers and dispositions of property for fraud, and to have them set aside, and the property delivered or accounted for to him by the fraudulent transferee.[5] Thus the receiver becomes the legal assignee of a judgment recovered by the debtor, and is vested with the right of property therein.[6] The title is thus subject to all liens acquired by an innocent purchaser for value and in good faith, and to any execution levied before the appointment.[7] And a sale of

[1] National Mechanics' Banking Association v. Mariposa Co. 60 Barb. 423, where the creditor and his receiver remained inactive for over a year.

[2] Young v. Aronson, 27 Fed. Rep. 241. *Cf.* Thompson v. Van Vechten, 5 Duer, 618.

[3] Verplanck v. Van Buren, 76 N. Y. 247, reversing s. c. 11 Hun, 328. In this case it was held that an action brought by the earlier receiver was not an action between different parties as compared with an action by a second receiver against the same defendants. See also Bostwick v. Menck, 40 N. Y. 383.

[4] Text approved in Atkinson v. Foster, 27 Ill. App. 63.

[5] Dunham v. Byrnes, 36 Minn. 106; Mandeville v. Avery, 124 N. Y. 376; Stephens v. Perrin, 143 N. Y. 476; Hedges v. Polhemus, 30 N. Y. S. 556.

[6] Turner v. Holden, 94 N. C. 70.

[7] Becker v. Torrance, 31 N. Y. 631; Chautauqua County Bank v. Risley, 19 N. Y. 369; Shand v. Handley, 71 Id. 319.

the property to an innocent purchaser, even if void as against creditors, must be formally impeached by action.[1] And the same rule obtains as to any transfer or assignment, the receiver in all cases taking only the interest of the debtor.[2]

But where it appears that the assignee under a general assignment has not claimed the property of a judgment debtor, but that it has remained in the possession and under the control of the assignor, and that such possession appears to be with the assent and acquiescence of the assignee, or because, for some other sufficient reason, he is deprived of the right of possession, the court may order the debtor to deliver the property to a receiver appointed in supplementary proceedings subsequently to the assignment.[3]

The institution of supplementary proceedings creates no lien on the defendant's property, and he may transfer it subject only to the liability to punishment for contempt for violating the injunction which is usually incorporated in the order for examination. The receiver does not hold the property vested in him as trustee for the benefit of the plaintiff alone, but he represents all the creditors and is trustee for all. As such he may institute proceeding to set aside fraudulent conveyances and transfers made by the debtor, which are either void at common law, or forbidden by statute; and when such transfers are declared void, the property passes to the receiver, who thereupon becomes a trustee for all the parties in interest.[4] As the receiver succeeds to the title of the debtor, a chattel mortgage which is good as against him, is good also as against the receiver.[5] It is, as will more fully appear in the next chapter, a contempt to interfere with a receiver by instituting a suit against him without permission.[6] Accordingly, the receiver is not subject to an injunction, because, if he were, that, in effect, would be an enjoining of the court of which he is an officer.[7]

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[1] Brown v. Gilmore, 16 How. Pr. 527; Field v. Sands, 8 Bosw. 685. *Cf.* Wright v. Nostrand, 94 N. Y. 31.

[2] Gardner v. Smith, 29 Barb. 68; Voorhees v. Seymour, 26 Id. 585; Roy v. Baucus, 43 Id. 310.

[3] Eastern National Bank v. Hulshizer, 2 N. Y. State Rep. 115.

[4] Bostwick v. Beizer, 10 Abb. Pr. 197. But see Bostwick v. Menck, 40 N. Y. 383.

[5] Gardner v. Smith, 29 Barb. 68. But under a recent statute a chattel mortgage is void as to creditors, whether by judgment or simple contract, if it be not recorded and the mortgagee have not entered into possession, and hence is void as to a receiver in aid of such creditors. Clark v. Gilbert, 10 Daly, 316. *Cf.* Campbell v. Fish, 8 Id. 162; Tinkey v. Langdon, 13 N. Y. Weekly Digest, 384; s. c. 60 How. Pr. 180.

[6] Taylor v. Balwin, 14 Abb. Pr. 166; Riggs v. Whitney, 15 Id. 388; DeGroot v. Jay, 30 Barb. 483.

[7] Van Rensselaer v. Emory, 9 How. Pr. 135.

It should not be overlooked that the title to the debtor's property, having once vested in the receiver, cannot be divested except by order of the court by which he was appointed, or by proceedings to which he is a party.[1]

Section 640. **Of the Time when the Title Vests.**—The provision of the New York code of civil procedure as to the time when the title to the debtor's property vests in the receiver, is as follows: "The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, or extending his receivership, as the case may be; subject to the following exceptions: 1. Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated. 2. Where the judgment debtor, at the time when the order is filed, resides in another county of the state, his personal property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides."[2]

It will be noticed that the first requirement is that the receiver qualify, and that until that is accomplished he can have no title or right of possession.[3] But upon qualifying, his title dates back to the time of the appointment.[4]

There are, moreover, certain other qualifications of the receiver's right of title or possession. Thus, for example, as to certain classes of property the receiver is entitled to immediate possession, while as to others he must obtain, in the first place, an order of court to entitle him to possession. As a general rule he is entitled to the immediate possession of all the personal property belonging to the defendant at the time the proceedings in which he was appointed were instituted, or which was then under the defendant's control, or in the possession of others for his benefit or account.[5] The term

[1] Rogers v. Corning, 44 Barb. 229. In this case a receiver brought an action to recover a note in the hands of third persons, who had, subsequently to his appointment, procured an *ex parte* order directing that the same be applied on a judgment which they held against the debtor.

[2] N. Y. Code Civil Proc. section 2468.

[3] Voorhees v. Seymour, 26 Barb. 569; Conger v. Sands, 19 How. Pr. 8; Banks v. Potter, 21 Id. 469.

[4] Steele v. Sturges, 5 Abb. Pr. 442.

[5] Van Rensselaer v. Emery, 9 How. Pr. 136; Harrison v. Maxwell, 44 N. J. Law, 316; Dubois v. Cassidy, 75 N. Y. 298; Coleman v. Roff, 45 N. J. Law, 7. Under the old code in New York the title related back to the time of the appointment. Becker v. Torrance, 31 N. Y. 631; Fillmore v. Horton, 31 How. Pr. 424; Banks v. Potter, 21 Id. 469; Conger v. Sands, 19 Id 8; Coope v. Bowles, 28 Id. 10; Lottimer v. Lord, 4 E. D. Smith. 183; Fields v. Sands, 8 Bosw. (N. Y.) 685.

personal property in this connection is used in a broad sense. Thus, a certificate of membership in an exchange will, under this rule, pass to the receiver and he may maintain a suit to redeem it from a pledgee.[1]

The term includes, moreover, the use, rents and profits of the real estate of the defendant sold on execution during the year allowed for redemption;[2] also a fund, the income of which belongs to the defendant, where he has the right to demand the principal.[3] And where the income of a trust estate had been verbally transferred to the debtor for a consideration, the receiver was held entitled to the possession of the amount in the hands of the trustee.[4] So also, an annuity will pass to the receiver.[5] And where the debtor destroyed a note after the appointment of a receiver of his property, and received in exchange therefor two other notes, the receiver was, under a peculiar state of facts, held entitled to recover upon the first, but it seems that the other did not pass to him.[6]

In supplemental proceedings the statute possesses the receiver with the property and effects of the judgment debtor from the time of the service of the restraining order; and, if there be no such order, then from the time of the filing and recording of the order for the appointment of the receiver.[7]

Section 641. **Further of the Receiver's Title.** — If the mortgagor of a chattel is entitled to the possession of the property, a receiver of the mortgagor's estate will take title to the property and may sell it.[8] Upon a similar principle a receiver succeeds to the rights of a tenant by the courtesy and is entitled to all rents due,[9] and even to the dower of the debtor if not assigned.[10] In order to acquire the title to real property, the receiver must comply with all the requirements of the local statute.[11] In New York in these cases a

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[1] Powell v. Waldron, 89 N. Y. 328.

[2] Farnham v. Campbell, 10 Paige, 598. But where the debtor sells the lease or sublets, the equity of the landlord is superior to that of other creditors. Riggs v. Whitney, 15 Abb. Pr. 388.

[3] Hallett v. Thompson, 5 Paige, 583.

[4] McEwen v. Brewster, 19 Hun, 337.

[5] Ten Broeck v. Sloo, 13 How. Pr. 28; s. c. 2 Abb. Pr. 234.

[6] Thorn v. Fellows, 5 N. Y. Weekly Dig. 473.

[7] Rose v. Baker, 99 N. C. 323.

[8] Manning v. Monaghan, 23 N. Y. 539. The sale must convey the whole property to one person where a sale in parcels would prejudice the revisionary interest of the mortgagee.

[9] Beamish v. Hoyt, 2 Robert. (N. Y.) 307; Ellsworth v. Cook, 8 Paige, 643.

[10] Tompkins v. Fonda, 4 Paige, 448; Stewart v. McMartin, 5 Barb. 438; Moak v. Coats, 33 Id. 498; Payne v. Becker, 87 N. Y. 153.

[11] Manning v. Evans, 19 Hun, 500; Wing v. Disse, 15 Id. 190; Cooney v. Cooney, 65 Barb. 524; Hayes v. Buckley, 53 How. Pr. 178.

conveyance is no longer necessary,[1] but, under the code, realty situated without the state will not pass to the receiver, in as much as he becomes vested with title to realty only upon filing a copy of the order appointing him in the county where it is situated, which can have no effect without the state. Accordingly, a refusal of the debtor to convey real estate so situated, under an order of the court, can not be punished as a contempt.[2] Money in the hands of a sheriff passes to the receiver, but an order of the court is necessary to confer upon him the right of possession.[3] And the same rule obtains as to a surplus in the hands of a chattel mortgagee who has sold more property than was sufficient to satisfy his claim;[4] so also, of property in the hands of third persons who substantially dispute the defendant's title.[5]

It is improper to order a delivery to a receiver of property in the possession of the debtor, avowedly as agent for a third person, where that third person also had an apparently valid paper title.[6] The receiver becomes vested with the legal title to all the debtor's personal property.[7] But not with title to real estate held in trust for the debtor, or any interest therein.[8] He takes an unliquidated claim for damages, to recover which an action is pending, which the receiver should also prosecute to judgment.[9]

Under a code of civil procedure declaring that real property of a judgment debtor is vested in the receiver from the time the order appointing him is filed in the county where the real property is situated, the receiver is entitled to the rents of the property not occupied by the debtor himself, and it is a contempt of court for the debtor to interfere with the collection thereof by receiver.[10]

Section 642. **Of the Title to Trust Property, Choses in Action, etc.** — The receiver acquires no title to property held as tenant at

[1] See the cases in the preceding note. *Contra*, Scott v. Elmore, 10 Hun, 68; Moak v. Coats, 33 Barb. 498. *Cf.* under the old code, Banks v. Potter, 21 How. Pr. 469; Porter v. Williams, 9 N. Y. 142; Voorhees v. Seymour, 26 Barb. 569; Fredericks v. Niver, 28 Hun, 417; Wright v. Nostrand, 47 N. Y. Super. Ct. 441; Chautauqua County Bank v. Risley, 19 N. Y. 369.

[2] Smith v. Tozer, 11 N. Y. Civ. Proc. Rep. 343. The rule was otherwise in equity. Chautauqua County Bank v. Risley, 19 N. Y. 369. *Cf.* Bunn v. Fonda, 2 Code Rep. (N. Y.) 70.

[3] Salter v. Bowe, 32 Hun, 237.

[4] Davenport v. McChesney, 86 N. Y. 242.

[5] Dewey v. Finn, 18 N. Y. Weekly Dig. 558.

[6] Rodman v. Henry, 17 N. Y. 482.

[7] Mandeville v. Avery, 124 N. Y. 376.

[8] Boid v. Dean, 48 N. J. Eq. 193.

[9] O'Gorman v. Sabin (Minn.), 64 N. W. R. 84.

[10] Vermont Marble Co. v. Wilkes, 30 N. Y. S. 381.

suffrance,[1] nor to property exempt by law from levy under execution, and no exception of such property need be inserted in the order of appointment.[2] The exemption includes insurance money paid to the debtor for the loss or destruction of exempt property,[3] and a right of action to recover damages to such property.[4] If, in such a case, the receiver collect the judgment he may be required to pay the proceeds over to the defendant.[5] So also, property acquired by the defendant subsequently to the institution of the proceedings in which the receiver is appointed, does not pass to the receiver.[6] This also includes property acquired subsequently to the appointment.[7] Nor does the interest of the defendant in property held in trust for his benefit pass to the receiver; but the surplus of the income thereof, in excess of what is necessary for his support, may be reached.[8] And it has been held that the receiver can not maintain an action to enforce the trust in favor of creditors, where lands are taken in the name of another than the one paying the consideration.[9] The receiver can not sue to recover commissions due the defendant as executor, nor can he demand an accounting in order to have the commissions declared.[10] And generally wages due for personal services can not be reached.[11]

The mere appointment of the receiver vests in him the title to the personal property, choses in action and equitable interests of the debtor.[12]

Section 643. **Of the Nature of the Receiver's Office.** — The order appointing a receiver operates as an equitable execution, and

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[1] Gardner v. Smith, 29 Barb. 68. This was a case of a chattel mortgage in which the mortgagor and debtor had defaulted.

[2] Finnin v. Malloy, 33 N. Y. Super. Ct. 382.

[3] Cooney v. Cooney, 65 Barb. 524. In this case the court allowed the receiver to be made a party to the action between the defendant and the insurance company. The defendant is to be allowed a reasonable time to invest the proceeds so as to replace the property.

[4] Andrews v. Rowan, 28 How. Pr. 126.

[5] Tillotson v. Wolcott, 48 N. Y. 188.

[6] Thorn v. Fellows, 5 N. Y. Weekly Dig. 473; Merritt v. Sawyer, 6 T. & C. (N. Y.) 160. *Cf.* Dubois v. Cassidy, 75 N. Y. 298; Campbell v. Genet, 2 Hilt. (N. Y.) 290.

[7] Graff v. Bonnett, 25 How. Pr. 470; Genet v. Foster, 18 Id. 50.

[8] Manning v. Evans, 9 N. Y. Weekly Dig. 311; Campbell v. Foster, 35 N. Y. 361. *Cf.* Graff v. Bonnett, 31 N. Y. 9, affirming s. c. 2 Robert. 54; Scott v. Nevius, 6 Duer. 672.

[9] Underwood v. Sutcliffe, 77 N. Y. 58.

[10] Worrall v. Driggs, 1 Redf. (N. Y.) 449.

[11] Howell v. McDowell, 47 N. J. Law, 359; s. c. 1 Cent. Rep. 190. In New York this is limited to wages for sixty days which are necessary for the support of the debtor's family.

[12] Young v. Clapp, 147 Ill. 176.

resembles in some essential particulars the levy of an execution by a sheriff or marshal.[1] Delay or negligence upon the part of the receiver in taking possession of the property of the defendant will not, in the absence of fraud or collusion, impair his title, but an unreasonable delay may postpone his rights in favor of a third person acting in good faith.[2] Although the object in appointing a receiver is to secure the payment of the judgment if, after the appointment, the judgment is paid, with or without the receiver's intervention, he is not *ipso facto* discharged, but until a formal order to that effect is entered, his office and function subsist, and he retains title to the property.[3] In any event it is prudent to procure a formal discharge, because until such discharge there is nothing to prevent the receiver from making a valid conveyance of the property to a purchaser in good faith. A receiver represents all the parties in interest, not only the creditor at whose instance he was appointed, but also the debtor of whose property he takes possession.[4] But there is authority for the position that the receiver represents only the creditor for the enforcement of whose judgment he was appointed, and that, as respects the assets in the debtor's possession, his authority and power extend no further than to secure the amount of the particular judgment, with interest, costs and expenses.[5] Upon the payment of the judgment he ought to return the balance of the property in his hands to the defendant.[6]

Section 644. **Of the Control of the Receiver by the Court.** — It is a general rule that the receiver is subject to the control of the court.

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[1] Manning v. Monaghan, 28 N. Y. 585; Lanigan v. The Mayor, 70 Id. 454; Becker v. Torrance, 31 Id. 631.

[2] Wilson v. Allen, 6 Barb. 542; Fessenden v. Woods, 3 Bosw. 550; Gere v. Dibble, 17 How. Pr. 31. In the last case a second receiver was appointed upon the application of another creditor, and the first practically discharged.

[3] Crooks v. Findley, 60 How. Pr. 375, 377. *Cf.* Dilling v. Foster, 21 S. C. 335. It was held in Anderson v. Treadwell, 1 Edm. Sel. Cas. 201, that the assignment to a receiver resembled a mortgage, and became void upon the payment of the judgment, and that the property thereupon reverted to the defendant without a reassignment. This case seems to overlook the theory of notice of *lis pendens*, which remains a cloud until canceled. Righton v. Pruden, 73 N. C. 61.

[4] Cummings v. Egerton, 9 Bosw. 684; Tinkham v. Borst, 24 How. Pr. 246; Bostwick v. Beizer, 10 Abb. Pr. 197. In the last case the receiver was said to be a trustee for all the parties. See, however, Bostwick v. Menck, 40 N. Y. 383.

[5] Young v. Aronson, 27 Fed. Rep. 241. See, also, Bostwick v. Menck, 40 N. Y. 383, for the rule as to the extent of the receiver's power to set aside a fraudulent assignment and to recover property from an assignee.

[6] Dilling v. Foster, 21 S. C. 335; Porter v. Williams, 9 N. Y. 142; Banks v. Potter, 21 How. Pr. 473.

In North Carolina he is under the direction and control of the court where the judgment upon which the proceedings are founded was obtained.[1] In New York the rule formerly was that the judge who made the appointment could control,[2] but this rule is now changed, and the receiver is subject to the direction and control of the court out of which the execution was issued.[3] But if the receivership have been extended, only the court which made the original appointment can exercise control.[4]

It is a deduction from this rule that all motions and proceedings affecting the receivership should be made to the court exercising control.[5] This includes motions to set aside the order of appointment for irregularity or collusion.[6] But where a receiver in supplementary proceedings has been appointed, and subsequently an independent action is brought in the same court, by one of the parties to the action in which the receiver was appointed, to recover certain property of which the receiver had taken possession, the plaintiff claiming to be the sole owner thereof, the court has no power, upon a motion in the second action, to order the receiver appointed in the former action, either to indemnify one of the parties against the damages, costs, and expenses of the second action, or to restore the property.[7]

Neither ought the court to order a distribution where the receiver, in proceedings instituted by him as receiver, is threatened with an action for false imprisonment;[8] nor where the receivership has been extended by another court, will such other court direct the receiver to pay to a later judgment creditor funds previously received.[9] Nor will a court other than that by which the receiver was appointed, enjoin the receiver in a separate action from taking possession of the debtor's property;[10] but it may direct him to restore goods of which he has taken possession, but which are claimed by a third person, where the claimant under-

[1] Turner v. Holden, 94 N. C. 70.

[2] Webber v. Hobbie, 13 How. Pr. 382. *Cf.* Myrick v. Selden, 36 Barb. 15.

[3] N. Y. Code Civ. Proc, § 2471; Pool v. Safford, 14 Hun, 369; Lane v. Lutz, 1 Keyes, 203. The term "court," as here used, is technical.

[4] N. Y. Code Civ. Proc. § 2471; Banks v. Potter, 21 How. Pr. 469.

[5] Tillotson v. Wolcott, 48 N. Y. 188; Galster v. Syracuse Savings Bank, 29 Hun, 594.

[6] Lippincott v. Westray, 6 N. Y. Civ. Proc. Rep. 74; Connolly v. Kretz, 78 N. Y. 620. *Cf.* Bruns v. Stewart Manuf. Co. 31 Hun, 195, and see Wing v. Desse, 15 Hun, 190, as to the power to accept a resignation and make a new appointment.

[7] Galster v. Syracuse Savings Bank, 29 Hun, 594.

[8] Morris v. Hiler, 57 How. Pr. 322.

[9] Genet v. Foster, 18 How. Pr. 50.

[10] Van Rensselaer v. Emery, 9 How. Pr. 135.

takes to hold them subject to the order of the court, a reference for the purpose of trying the title being ordered.[1]

The fact that the defendant has been employed by the receiver to make collections, does not constitute a sufficient ground for removal, where it is shown that no part of the funds collected were used by the defendant for his own benefit.[2]

Section 645. **Of the Powers of the Receiver.**—It has been held that the measure of the receiver's powers is to be found in the order of his appointment. This was the rule under the equity practice, and although somewhat modified by modern statutes, is still, in general, the rule which is to be applied to receiverships such as we are now considering. But no statute can give a receiver extra-territorial powers, and he can not, by virtue of the authority conferred upon him by an enabling statute, pursue the debtor's property beyond the state in which he is appointed.[3] The general rule is, that he has authority to prosecute actions in any court of competent jurisdiction for the purpose of collecting all the debts and claims of the defendant.[4] By virtue of this authority he may generally maintain actions in his own name to set aside fraudulent conveyances and transfers,[5] and to such an action the debtor and the fraudulent grantees ought to be made parties.[6]

The receiver in these actions is regarded as a trustee for the creditors in whose interest he was appointed, and he can prosecute his action only so far as is necessary to enforce their claims, his right of action being the same as that of the creditors.[7] In this class of cases, if the conveyance is set aside and the property sold, it will be

[1] Dickerson v. Van Tine, 1 Sandf. Super. Ct. 724.

[2] Ross v. Bridge, 24 How. Pr. 168; s. c. 15 Abb. Pr. 150.

[3] Booth v. Clark, 17 How. (U. S.) 322.

[4] Rockwell v. Merwin, 1 Sweeny, 484; s. c. 8 Abb. Pr. (N. S.) 330. *Cf.* Fessenden v. Woods, 3 Bosw. 550; Barker v. Dayton, 28 Wis. 367; Miller v. Mackenzie, 29 N. J. Eq. 291. See also the following chapter for a detailed consideration of the receiver's power to bring suits of this character.

[5] Porter v. Williams, 9 N. Y. 142; Bostwick v. Menck, 40 Id. 383; Underwood v. Sutcliffe, 77 Id. 58; Manley v. Rassiga, 18 Hun, 288; Hamlin v. Wright, 23 Wis. 491. *Contra*, Higgins v. Gillesheimer, 26 N. J. Eq. 308. Formerly it was the rule in New York that the receiver was entitled to the custody and control only of such property as was in the possession of the debtor, and that actions of this sort could only be brought by the creditor. Seymour v. Wilson, 16 Barb. 294; Hayner v. Fowler, Id. 300.

[6] Miller v. Hall, 70 N. Y. 250; Hamlin v. Wright, 23 Wis. 491; Palen v. Bushnell, 18 Abb. Pr. 301; Allison v. Weller, 3 Hun, 608.

[7] Bostwick v. Menck, 40 N. Y. 383; Olney v. Tanner, 10 Fed. Rep. 101; s. c. affirmed, 21 Blatchf. 540; Goddard v. Stiles, 90 N. Y. 199.

subject to the dower of the debtor's wife.[1] And in the case of an assignment, if the assignees were not guilty of fraud, and are responsible, the court may permit them to retain possession as special receivers.[2]

The receiver will not be entitled to an injunction where he fails to show that the assignment was made to hinder, delay, or defraud creditors.[3] In an action for conversion against the judgment creditor for levying upon and selling property claimed by, and in the possession of, a third person, the fact that a receiver, appointed for the enforcement of the judgment under which the levy was made, has obtained possession of a note given as the purchase price of the goods at the sale, does not estop the creditor from impeaching the title to the property upon the ground of fraud.[4] It is a salutary rule that the receiver can not waive the equitable rights of the creditor.[5] He may, however, retain the attorney of the judgment creditor,[6] and he may employ agents who, in acting in his behalf, must show their authority.[7]

Receivers appointed in supplementary proceedings are statutory receivers and have no powers beyond those given by statute.[8]

Section 646. **Of the Duties of the Receiver.** — The duties of a receiver in supplementary proceedings resemble essentially those of a receiver under the former creditor's bill in chancery, being, in general, the same so far as they are appropriate and applicable under the statutory proceedings. Where the order appointing the receiver requires the debtor to deliver his property to the receiver, it is necessary for the receiver to make a demand for it;[9] if such a direction be not contained in the order, the receiver can not effectively make a demand, since if delivery were refused, he would have to obtain another order directing the delivery.[10] A refusal, where there is no direction or special order to deliver, will not constitute a contempt,[11] but where the order of appointment directs a delivery, the rule is otherwise.[12] Pending litigation concerning the title to

[1] Lowry v. Smith, 9 Hun, 514.

[2] Spring v. Strauss, 3 Bosw. 607.

[3] Bostwick v. Elton, 25 How. Pr. 362.

[4] Briggs v. Merrill, 58 Barb. 389.

[5] Keiley v. Dusenbury, 42 N. Y. Super. Ct. 238.

[6] Baker v. Van Epps, 60 How. Pr. 79, overruling Branch v. Harrington, 49 Id. 196, and Cummings v. Egerton, 9 Bosw. 684.

[7] Blank v. Lindsey, 15 Ves. 91; People v. King, 9 How. Pr. 97.

[8] Levey v. Bull, 47 Hun, 350.

[9] McComb v. Weaver, 11 Hun, 271; Tinkey v. Langdon, 60 How. Pr. 180; Panton v. Zebley, 19 Id. 394.

[10] Webber v. Hobbie, 13 How. Pr. 382; People v. Mead, 29 Id. 360.

[11] Watson v. Fitzsimmons, 5 Duer, 629.

[12] Livingston v. Stoessel, 3 Bosw. 19.

personal property capable of mutual delivery, the receiver should obtain an order for its deposit in court.[1]

The court has no power, without personal notice to the judgment debtor, to make an order directing the receiver to apply any portion of the funds coming to his hands, in payment of judgments other than that for the enforcement of which he was appointed, or of those to which his receivership has been extended as prescribed by the statute.[2]

The receiver, it may here be remarked, is entitled to a commission, the amount of which in the absence of a statute, will be determined by the court,[3] but of this there is a fuller consideration elsewhere.

The receiver's duties are at an end where the judgment has been paid.[4]

Section 647. **Of Actions by the Receiver.** — The general rule is that the receiver may institute an action against any person who has fraudulently received or interfered with the property of the debtor, and, in such cases, he may recover the specific thing or its value, together with damages and costs.[5] A receiver may recover surplus moneys arising on a sale of mortgaged chattels.[6] Accordingly a receiver is authorized to maintain suits to set aside fraudulent transfers of property,[7] but in case of a dispute concerning the title, it would be irregular for the judge appointing the receiver summarily to pass upon the title.[8] And when the receiver sues to set aside a fraudulent transfer, an injunction will not issue unless the court is satisfied that he is entitled to the relief demanded, or

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[1] People v. King, 9 How. Pr. 97.

[2] Goddard v. Stiles, 90 N. Y. 199, s. c. 99 Id. 640. In this case the receiver was substituted for the debtor in a pending action in which he retained his own counsel, agreeing to pay the debtor's attorney a certain sum as his compensation. The debtor having had no notice, and the order of substitution having been entered by consent of the attorney, it was held that the order fixing the compensation of the attorney was not binding upon upon his client.

[3] Gardiner v. Tyler, 3 Trans. App. (N. Y.) 161; s. c. Abb. App. Dec. 247; 2 Abb. Pr. (N. S.) 463; 3 Keyes, 505; Baldwin v. Eazler, 34 N. Y. Super. Ct. 274. See also the chapter upon the Receiver's Compensation, *infra*.

[4] Gifford v. Rising, 59 Hun, 42.

[5] Underwood v. Sutcliffe, 77 N. Y. 58; Bostwick v. Menck, 40 Id. 383; Henderson v. Brooks, 3 Thomp. & C. (N. Y.) 448; Barclay v. Quicksilver Mining Co. 6 Lans 25; Britton v. Lorenz, 3 Daly, 23; Hamlin v. Wright, 23 Wis. 491. See also N. Y. Session Laws, 1858, chap. 314, § 2.

[6] Davenport v. McChesney, 86 N. Y. 242.

[7] Prescott v. Pfeiffer, 23 N. W. Rep. 477. *Cf.* Brown v. Gilmore, 16 How. Pr. 527; Barker v. Dayton, 28 Wis. 367.

[8] Teller v. Randall, 40 Barb. 242.

has an apparent right to the property.[1] In New York it has been held that it is competent for the receiver to bring a suit to remove a cloud on the title of the debtor's real estate, in order that the sheriff may convey the property and give a good title under an execution sale.[2] So the receiver may maintain an action against the debtor for conversion of property which has come into his possession;[3] but his right of action goes, as we have already seen, no further than is necessary to satisfy the judgment for the enforcement of which he was appointed, together with damages and costs.[4] It has been held that he is entitled to be substituted as plaintiff in an action already commenced by the debtor;[5] but he can not be substituted for the defendant in actions pending against him brought by other creditors, nor has he a right to appeal from a judgment rendered, as if upon the ground that he is a person aggrieved who is not a party.[6] And in another case it was held that the substitution as plaintiff in these cases is a matter of discretion and not a matter of right.[7]

The receiver in these cases has a right to continue an action in the name of a corporation of whose property and franchises he has possession as receiver,[8] in which case he is chargeable with costs.[9] The receiver is not, in general, restricted to the court in which he may sue, except that he has no standing in a foreign jurisdiction,[10] but he may enforce the claims of the estate in his hands in any appropriate tribunal in the state of his appointment.[11] If a receiver obtain leave to sue, he is, generally bound to bring the action, but he may be subsequently restrained by the court appointing him.[12]

By the New York code of civil procedure certain persons acting in a representative capacity are empowered to sue in their own names. It has been held in construing this provision that a receiver

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[1] Bostwick v. Elton, 25 How. Pr. 362. In this case an ordinary affidavit of verification was held insufficient to establish any fact alleged therein on information and belief.

[2] Wright v. Nostrand, 94 N. Y. 31.

[3] Gardner v. Smith, 29 Barb. 68.

[4] Bostwick v. Menck, 40 N. Y. 383; Manley v. Rassiga, 13 Hun, 288.

[5] Matter of Wilds, 6 Abb. N. C. 307. *Cf.* Ross v. Wigg, 100 N. Y. 243, as to the right of substitution for the sake of an appeal, and see Wheeler v. Wheedon, 9 How. Pr. 293.

[6] Ross v. Wigg, 100 N. Y. 243; s. c. 1 Cent. Rep. 292. A person is not aggrieved for the purpose of an appeal, unless the judgment injuriously affects him in his rights, person or property.

[7] *In re* Lansing, 17 N. Y. Weekly Dig. 288.

[8] Columbian Insurance Co. v. Stevens, 37 N. Y. 536.

[9] Albany City Insurance Co. v. Van Vranken, 42 How. Pr. 281.

[10] Booth v. Clark, 17 How. (U. S.) 322.

[11] Rockwell v. Merwin, 45 N. Y. 166.

[12] Winfield v. Bacon, 24 Barb. 154; Van Rensselaer v. Emery, 9 How. Pr. 135.

in certain cases, as the trustee of an express trust, may maintain suits in his capacity as receiver in his own name.[1] He may sue under statute giving the right of action for usurious interest.[2]

Section 648. **The Same Subject Continued.**— The objection that the receiver in making a demand for the delivery of the debtor's property, did not exhibit his authority, is deemed waived if the refusal to deliver were not based upon that ground, nor will such an objection constitute, under these circumstances, a defence in a subsequent action.[3] Where a suit is brought to set aside a transfer of property upon the ground of fraud, or where the property is claimed to belong to the debtor in a representative capacity, he should be made a party to the suit;[4] but not, if the action be to recover premiums on the ground of usury.[5] And where the receiver, after commencing an action, is appointed receiver in other proceedings, subsequent causes of action arising therefrom can not be set up in the first action by a supplemental complaint, but a separate action must be instituted.[6] The complaint or petition should contain an allegation of the receiver's appointment,[7] in some states an allegation of his authority to sue in his own name,[8] and, generally, all the allegations necessary to sustain a creditor's suit.[9]

The creditor is not personally liable for costs in an action brought by the receiver, unless the action were virtually carried on by him.[10] If, however, the receiver bring an action in bad faith he may be made personally liable for costs,[11] for which also he may sometimes, in the discretion of the court, be required to give security.[12] The death or removal of a receiver will not cause the abatement of an action or special proceeding already commenced.[13] And where the creditor has waived fraud, and elects to sue for breach of contract, the receiver appointed upon his application cannot subsequently raise

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[1] Porter v. Williams, 9 N. Y. 142; Seymour v. Wilson, 15 How. Pr. 355; Bostwick v. Menck, 40 N. Y. 383.

[2] Palen v. Johnson, 46 Barb. 21.

[3] Livingston v. Stoessel, 3 Bosw. 19.

[4] Miller v. Hall, 70 N. Y. 250.

[5] Palen v. Bushnell, 18 Abb. Pr. 301.

[6] Bostwick v. Menck, 40 N. Y. 383.

[7] Rockwell v. Merwin, 45 N. Y. 166; Scroggs v. Palmer, 66 Barb. 505: Manley v. Rassiza, 13 Hun, 288. As to allegations concerning the issue of execution, see Campbell v. Foster, 35 N. Y. 364.

[8] Garver v. Kent, 70 Ind. 428. In New York this is regulated by statute. Porter v. Williams, 9 N. Y. 142.

[9] Coope v. Bowles, 42 Barb. 87; s. c. 28 How. Pr. 10.

[10] Ward v. Roy, 69 N. Y. 86. *Cf.* McHarg v. Donelly, 27 Barb. 100; Cutter v. Reilly, 31 How. Pr. 472.

[11] Cummings v. Egerton, 9 Bosw. 684.

[12] Welch v. Bogert, 3 N. Y. Weekly Dig. 402; Smith v. Clarke, 1 N. Y Month. Law Bull. 83.

[13] Nicoll v. Boyd, 90 N. Y. 516.

that question,[1] but if the receivership be extended for the benefit of other creditors who might raise the question, the rule is otherwise.[2]

Section 649. **When the Receiver Can Not Sue.**—A receiver can not bring a suit for the recovery of property which has been seized by the sheriff under levy of attachment, notwithstanding that the receiver was appointed upon the application of one of the attaching creditors.[3] Nor can he maintain either an action of replevin or conversion against a mortgagee of personal property, where such mortgagee has sold the property before the appointment.[4] Neither can he maintain an action to enforce a statutory trust in favor of the creditors of one paying the consideration for lands which are conveyed to another. Such a trust does not vest in the receiver, and he is not the representative of the creditor in respect to it.[5] Nor does any cause of action arise from service rendered by the debtor to his wife in managing her separate estate, unless an express promise be shown or other evidence be given tending to show an agreement.[6]

Where a debtor assigns his property to a creditor upon condition that he deduct his own debt and apply the proceeds toward the payment of other debts, and the assignee sells and transfers the property upon the same condition, which is only partially performed by such other assignee, no action can be maintained by the receiver for the balance.[7] Nor has a receiver any cause of action where a testator devised his estate to his executors in trust to convert the property into money, and to divide the proceeds into two shares, one of which was to go to the debtor; and if the receiver move for an order of sale it should be denied.[8] Nor can a receiver maintain an action for the partition of real property of which the debtor is tenant in common with others.[9]

Finally, if the judgment be paid before proceedings are commenced, they cannot be afterwards instituted for the benefit of other creditors, the receiver becoming thereby *functus officio*.[10]

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[1] Kennedy v. Thorp, 51 N. Y. 174 (as e. g. to set aside an assignment); Richards v. Allen, 3 E. D. Smith, 399.

[2] Savage v. Murphy, 34 N. Y. 508; Richardson v. Smallwood, Jac. 552; Botts v. Cozine, 1 Hoff. Ch. 79; Parish v. Murphree, 13 How. (U. S.) 99; Walter v. Lane, 1 McA. (D. C.) 275.

[3] Andrews v. Glenville Woolen Co. 11 Abb. Pr. (N. S.) 78. *Cf.* s. c. 50 N. Y. 282; Disbrow v. Garcia, 52 N. Y. 654.

[4] Fillmore v. Horten, 31 How. Pr. 424; Campbell v. Fish, 8 Daly, 162.

[5] Underwood v. Sutcliffe, 77 N. Y. 58, reversing s. c. 10 Hun, 453.

[6] Pettibone v. Drakeford, 21 N. Y. Weekly Dig. 96.

[7] Smith v. Woodruff, 1 Hilt. (N. Y.) 462. *Cf.* Murphy v. Briggs, 11 N. Y. Weekly Dig. 207.

[8] Scott v. Nevius, 6 Duer, 672. The executors were not parties to the proceeding in this case.

[9] Dubois v. Cassidy, 75 N. Y. 298.

[10] Righton v. Pruden, 73 N. C. 61.

CHAPTER XX.

SUITS BY AND AGAINST RECEIVERS — JUDGMENTS — REMEDIES AND PROCEDURE.

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Section 650. Necessity of Receiver to Have Leave of Court to Sue or Defend a Suit.

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I.

Of the Necessity of Leave of the Court for Receiver to Sue or be Sued.

Section 650. **Necessity of Receiver to Have Leave of Court to Sue or Defend a Suit.**— The Receiver is the officer, the agent and hand of the court, and, therefore, his powers are limited, and are derived from the order of appointment, if a common-law receiver, and from statute, if a statutory receiver. It follows necessarily, and especially in a matter of so great importance to the administration of the trust, that the receiver has no right to institute or prosecute any suit without the consent and authority of the court being first obtained, or subsequently given while the action is pending.[1] This is the general rule, and prevails in all courts, both federal and state. The authorities in support of this proposition are numerous and in full accord.[2]

It is also the general rule that a receiver has no authority to defend an action without leave of court.[3]

The receiver's petition must contain an allegation that leave of court to sue has been obtained, or it will be demurrable.[4]

The reason of the rule which denies to the receiver the right to institute and prosecute litigation without leave of court has been

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[1] Lothrop v. Knap, 37 Wis. 307.

[2] Wayne Pike Co. v. State *ex rel.* 134 Ind. 672; Wynn v. Lord Newborough, 3 Bro. C. C. 88; Green v. Winter, 1 Johns. Ch. 60; Ward v. Swift, 6 Hare, 312; *In re* Merritt, 5 Paige, 125; Merritt v. Lyon, 16 Wend. 405; Davis' Adm'r v. Snead, 33 Gratt. 705; Swaby v. Dixon, 5 Sim. 629; Conyers v. Crosbie, 6 Ir. Eq. 657; Anon. 6 Ves. 287; Reynolds v. Pettyjohn, 79 Va. 327; Battle v. Davis, 66 N. C. 252; Scriven v. Clark, 48 Ga. 41; Glenn v. Busey, 3 Cent. R. (Colo.) 283; Wisener v. Meyers, 3 Pa. D. R. 687; Merritt v. Lyon, 16 Wend. 405; Pitt v. Snowden, 3 Atk. 750; Pouder v. Catterson, 127 Ind. 434; Piper v. Stratten, 7 S. W. R. 45; Swing v. White River Co. 65 N. W. R. 174.

[3] Davis' Adm'r v. Snead, 33 Gratt. 705; Swaby v. Dixon, 5 Sim. 629; Conyers v. Crosbie, 6 Ir. Eq. 657; Anon. 6 Ves. 287; Reynolds v. Pettyjohn, 79 Va. 327; Bristowe v. Needham, 2 Phil. Ch. 190.

[4] Pouder v. Catterson, 127 Ind. 434; Wayne Pike Co. v. State *ex rel.* 134 Ind. 672; Davis v. Talbutt, 27 N. E. R. 494; Swing v. White River Lumber Co. 65 N. W. R. 174; Keen v. Breckenridge, 96 Ind. 69; St. Louis, Alton & Springfield Railroad Co. v. Hamilton, 41 N. E. R. 777; Hatfield v. Cummings (Ind.), 39 N. E. R. 859.

said to be founded on the absence of title in him;[1] but even when he becomes invested with the title to the property the rule still applies; and the true reason of the rule may be said to be that the receiver is wholly under the control of the court, that his powers are limited to those conferred by the court, or by statute, and that in so important a matter as litigation over the trust estate the court must be consulted and is entitled to direct its officer.

Section 651. **Generally of Granting Leave to Receiver to Sue — Incidents and Exceptions to the Rule.**— In order to avoid the necessity of frequent applications to the court for leave to bring actions, it has become customary to give the receiver, in the order by which he is appointed, a general leave to bring suits for the collection of the assets and for obtaining possession of the property over which he is to have charge. A decree of the court appointing a receiver to collect partnership assets, has been held to be of itself sufficient authority to him to institute a suit against a debtor of the partnership; and the transcript of the proceedings in the suit in which he received his appointment need not be produced to prove his authority.[2]

But the authority to sue conferred by the order of appointment is confined to such suits as are contemplated by the order, and to the property under the receiver's control. So where the decree appointing a receiver authorized him to sue for all the assets of a defunct corporation, of every kind and character, it was held that he could not sue for damages for waste or injury to property not in his possession, except by order of the court.[3]

An order directing the receiver to collect the property and hold it subject to the further order of the court, was held to be insufficient to authorize him to bring a suit to recover a part of the property.[4] But, under a statute which made it the duty of the receiver to take charge of and sell the property, and collect the debts, and declared that he should be bound and held liable for default, negligence or malfeasance in office, it was decided that a receiver might bring an action, without a special order granting leave, upon an appeal bond which stood in the place of the property taken from his possession pending the appeal, the appeal having resulted in the confirmation of his appointment.[5]

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[1] Singleby v. Fox, 75 Pa. St. 112; Pouder v. Catterson, 127 Ind. 434.

[2] Helme v. Littlejohn, 12 La. Ann. 298.

[3] Alexander v. Relfe, 9 Mo. App. 133, 139.

[4] Screven v. Clark, 18 Ga. 41.

[5] Everett v. The State, 28 Md. 190.

In some of the states, statutes regulating the powers of receivers, authorize them to institute proceedings in prescribed cases without formal leave of court. In such case special authority to sue from the court appointing them is unnecessary.[1] It is presumed that the receiver, being positive in the propriety of bringing an action, would hardly be authorized to discontinue it without leave of the court.

It has been said that the authority of the receiver to sue may be presumed; as where he brought suit in the court in which he was appointed, and prosecuted the same with its sanction. In such a case it was held that the receiver need not produce express authority to sue.[2]

The rule requiring a receiver to obtain the consent of the court before instituting suit is said not to apply to an action to enforce an obligation or duty due the receiver as such, and which results from a transaction with him.[3] This proposition is not at all acceptable, and we fail to appreciate or comprehend why the reason of the rule should cease under such condition. The expense, risk and importance of the litigation to the estate, and the power of the court to control and direct the receiver are the same as in respect of a suit to enforce an obligation contracted by the debtor whose property the receiver possesses.

If the order of appointment be sufficiently broad to authorize the rcceiver to institute and prosecute suits, no other or special order conferring such authority is necessary. Authority to the receiver to sue generally is conferred in an order reading: "to take charge and custody of all property, choses in action and things of value of said defendant, with all the rights, powers and privileges under the law."[4] It was said in the case cited that, "ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate and necessary actions without special leave or direction of the court."

It has been said to be not only the right but the duty of a re-

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[1] Hayes v. Brotzman, 46 Md. 519.

[2] Cox v. Volkert, 86 Mo. 505.

On an application to the court for leave to sue the receiver the judge made the following endorsement: "The party can sue if he chooses; but there is no earthly occasion for it, because the receiver has instructions to pay all debts and to sell property to supply the money demand on him." Held that such endorsement was not consent to sue, without which suit could not be maintained. Piper v. Stratten, 7 S. W. R. 45.

[3] Pouder v. Catterson, 127 Ind. 434; Kehr v. Hall, 117 Ind. 405; Singelby v. Fox, 75 Pa. St. 112.

[4] Weill v. First National Bank 106 N. C. 1.

ceiver to institute legal proceedings without waiting for leave, when the circumstances of the case require it.[1]

Section 652. **Effect of Want of Leave to Receiver to Sue — Waiver.** — It has been asserted that if a receiver institute a suit without leave of court, the omission will not avail the defendant as a defence, but the action may be stayed by the court, and will be, if brought unjustifiably.[2] The same principles applicable to the question concerning the effect on a suit instituted against a receiver without leave of court previously obtained are applicable to the topic of this section, and are discussed in a subsequent section.[3] The omission is an irregularity only, which may be waived. It is not jurisdictional. The objection that the receiver had obtained the assent of the court to sue, cannot be raised for the first time on appeal.[4]

Section 653. **Necessity of Leave of Court to Sue a Receiver — Cross-Bills.** — It would be inconsistent with the main purpose of a receivership — to preserve property in controversy *pendente lite* — which, as we have seen, devolves upon the court the duty of protecting its possession, as well as incompatible with the dignity and authority of the court, to allow its officer to be summoned before any tribunal in respect of the property in his hands, at the will of any and every person who has, or imagines he has, a just cause of action, or who, for sinister purposes, might institute a fictitious suit against him.

On the other hand, to deny those having just causes of action or claims which call for the adjudication of courts of law or equity, all opportunity for investigation and all right to a proper remedy, simply because the property to which they must look for reparation, has been seized by the court and is in its keeping, would violate the fundamental principles of personal rights.

The difficulty thus presented has been happily and satisfactorily overcome by requiring all those who desire to bring suit against a receiver first to obtain leave to do so from the court which appointed him,[5] excepting receivers of federal courts, who by act of congress

[1] Lansing v. Manton, 14 Nat. Bank Reg. 127, U. S. Dist. Ct. Northern district of N. Y., Wallace, J.

[2] Lansing v. Manton, 14 Nat. Bank Reg. 127; U. S. Dist. Ct., Northern District N. Y., Wallace. J.

[3] Section 658.

[4] Conley v. Deere, 11 Lea. 274.

[5] Davis v. Gray, 16 Wall. 203, 218, and cases cited; Barton v. Barbour, 104 U. S. 126 (affirming s. c. 3 MacArthur, 212), in which it was held that the rule applies to suits against a receiver on a money demand, or for damages, as well as to those the object of which is to recover property from the possession

may be sued without leave.[1] The courts usually grant such leave unless it appears clearly from the application of the claimant that his demand has no legal foundation. The petition should, therefore, show a probable cause of action, one demanding adjudication by proceedings in court.[2]

It is the general rule that a receiver cannot be sued without leave of the court first obtained,[3] or garnished.[4] An answer in the nature of a cross-action in a suit instituted by a receiver has been held to be inadmissible without leave to file it being granted by the appointing court.[5]

"The receiver is an officer of the court, and in all respects subject to its orders and directions in so far as his duties as such go, is not amenable to any other power or authority, and at all times is under the protection of the court; and the property in his hands is *in custodia legis*. To permit any one to bring actions against him * * * would be to remove him from the protection of the court, and the property from its protection and control."[6]

It is for the court having jurisdiction of the receivership proceedings to decide whether it will determine all claims against the receiver, or allow them to be litigated elsewhere.[7] "There is no better settled proposition than that a receiver, as such, can not be sued elsewhere than in the court by which he was appointed, without the

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of the receiver. Thompson v. Scott, 4 Dill. 508; Kennedy v. Indianapolis C. & L. R. R. Co. 3 Fed. Rep. 97; s. c. 2 Flippin, 704; Parker v. Browning, 8 Paige, 388; DeGroot v. Jay, 30 Barb. 483; s. c. 9 Abb. Pr. 364; Taylor v. Baldwin, 14 Abb. Pr. 166; Miller v. Loeb, 64 Barb. 454; Little v. Dusenberry, 46 N. J. Law, 614; s. c. 50 Am. Rep. 445; Angell v. Smith, 9 Ves. 335; Brooks v. Greathead, 1 Jac. & Walk. 176; Randfield v. Randfield, 3 DeG. F. & J. 766, reversing s. c. 1 Dr. & Sm. 310; Searle v. Choate, 25 Ch. D. 723; Tink v. Rundle, 10 Beav. 318; Evelyn v. Lewis, 3 Hare, 472; *In re* Persse, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 55; Andrews v. Stanton, 18 Bradw. 163, 165; Melendy v. Barbour, 78 Va. 544; Rogers v. Mobile & Ohio R. R. Co. 16 Rep. 536 (Tenn. 1883), Graffenreid v. Brunswick & A. R. R. Co. 57 Ga. 22; Henderson v. Walker, 55 Ga. 481; Wray v. Hazlett, 6 Phila. 155; Keene v. Breckenridge, 96 Ind. 69; Meredith, etc., Savings Bank v. Simpson, 22 Kans. 414; Payne v. Baxter, 2 Tenn. Ch. 517; Heath v. Missouri, K. & & T. R. R. Co. 88 Mo. 617, 623.

[1] See section 659.

[2] Jordan v. Wells, 3 Woods, 527; Randfield v. Randfield, 3 DeG. F. & J. 766; Hills v. Parker, 111 Mass. 508.

[3] Martin v. Atchinson, 2 Idaho, 590; Porter v. Sabin, 36 Fed. R. 475; Spalding v. Commonwealth, 88 Ky. 135; Texas and Pacific Railway Co. v. Cox, 145 U. S. 593; Wayne Pike Co. v. State, 134 Ind. 672; Werner v. Murphy, 60 Fed. R. 769; De Graffenried v. Brunswick & Albany Railroad Co. 57 Ga. 22; Jones v. Browse, 32 W. Va. 444; Mulcahey v. Strauss, 37 N. E. R. 702; Brown v. Ranch, 1 Wash. St. 497.

[4] People *ex rel.* v. Brooks, 40 Mich. 338.

[5] Kortjohn v. Seiners, 29 Mo. App. 271.

[6] Martin v. Atchinson, 2 Idaho, 590.

[7] Porter v. Sabin, 36 Fed. R. 475.

leave of such court first had and obtained; and whether leave to sue will be granted, rests in the discretion of the court."[1]

A uit can not be maintained in a federal court against a receiver appointed by a state court, without leave of the latter.[2]

Section 654. **Exceptions and Incidents to the Rule Requiring Leave of Court to Sue a Receiver.**— The rule requiring leave of the court to sue the receiver is applicable only to suits against him in his official capacity, the judgment in which would affect the trust estate. For a tortious act a receiver has no immunity by reason of his appointment; his liability is personal, and he may be sued without the leave of any court.[3]

Where a vessel in the possession and under the control of a receiver of a federal court of one district, was sent into another, it was held that a proceeding against the vessel could be maintained in the latter for a marine tort irrespective of the leave of the appointing court.[4]

Section 655. **Suing a Receiver without Leave is a Contempt— Such Suit may be Enjoined or Stayed on Motion — Waiver.**— If a receiver, duly appointed and in possession of the property in controversy, be sued without the leave of the court appointing him first obtained, the parties who bring the suit may be subjected to proceedings in contempt of court and punished accordingly.[5] The proceedings in a suit so brought will generally be restrained by injunction,[6] or stayed or set aside on motion.[7] In New York, it has been held that if the court does not interfere by setting aside or staying the proceedings in a case brought against a receiver without leave, or by punishing the parties suing for a contempt, the action will be considered regular and a judgment therein will be valid.[8]

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[1] Reed v. Axtell, 84 Va. 231; Reed v. Richmond & Allegheny Railroad Co. 4 S. E. R. 589.

[2] Rejall v. Greenhood, 60 Fed. R. 784.

[3] Kenney v. Ranney, 96 Mich. 617.

[4] The St. Nicholas, 49 Fed. R. 671.

[5] Mulcahey v. Strauss, 37 N. E. R. 702; Hirshfield v. Kalisher, 30 N. Y. S. 1027, Wiswell v. Sampson, 14 How. 65, 66, 67; Naumburg v. Hyatt, 24 Fed. Rep. 898; Kennedy v. Indianapolis, C. & L. R. R. Co. 3 Fed. Rep. 97; Thompson v. Scott, 4 Dill. 508, wherein there is a full discussion of the question concerning leave to sue receivers, Express Co. v. Railroad Co. 99 U. S. 191, 198; DeGroot v. Jay, 30 Barb. 483, s. c. 9 Abb. Pr. 364; Taylor v. Baldwin, 14 Abb. Pr. 166; Davis v. Gray, 16 Wall. 203. 218 and cases cited.

[6] Evelyn v. Lewis, 3 Hare, 472; Tink v. Rundle, 10 Beav. 318; *In re* Persse, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 54; Kennedy v. Indianapolis, C. & L. R. R. Co. 3 Fed. Rep. 97.

[7] DeGroot v. Jay, 30 Barb. 483, s. c. 9 Abb. Pr. 364; Taylor v. Baldwin, 14 Abb. Pr. 166.

[8] Hackley v. Draper, 4 Thomp. & C. 614, 631, affirmed, 60 N. Y. 88.

It has been said that as this rule requiring leave of court before suing a receiver is based upon the duty of the court to protect its officer in his undisturbed possession, a receiver may waive his privilege of protection and may appear and plead in the cause; and that the want of such leave can not be made ground for dismissing the suit after the appearance.[1] Concerning this position, a learned writer has said: "It is difficult to see how this exemption from liability to suit without leave can be considered a privilege so personal to the receiver that he may waive it. In reality, it is the barrier which the court itself interposes against unwarranted interference with its own officers, and against depredations upon the estate which is in its own charge and custody."[2]

Section 656. **Granting Leave to Sue is Discretionary — Intervening Petitions.**—It rests in the discretion of the court to allow a party claiming rights against its receiver, to bring an independent action against him, or to compel such party to proceed against him by petition in the action in which he is receiver.[3] Thus where creditors sought leave to bring suit against a receiver of partnership property to have certain judgment notes given by the firm prior to its dissolution to other creditors, declared fraudulent, and to have the moneys realized thereon, together with assets of the firm, in the receiver's hands, including the value of the good will of the firm's business, which they alleged had been lost by the fault of the receiver, applied to the payment of their claims and to have the receiver suspended, it was held that there was no abuse of discretion by the court in refusing permission to make the receiver a party to the bill, in as much as all these objects could as well be accomplished by petition in the action to dissolve the partnership, as by an independent suit against the receiver.[4]

If the relief is sought by an intervening petition, the court may direct that issues of fact be tried by a jury, and whether such issues shall be tried by a jury or referred to a master for investigation and determination is a matter in which the court may exercise its discretion.[5]

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[1] Hubbell v. Dana, 9 How. Pr. 424, followed in Jay's case, 6 Abb. Pr. 293; Naumberg v. Hyatt, 24 Fed. Rep. 898, 901. See also *In re* Young, 7 Fed. Rep. 855.

[2] H. Campbell Black, Esq., in 25 Am. L. Reg. (N. S.) 289, 300. See section 655.

[3] Central Trust Co. v. Wabash, St. Louis, etc., R. R. Co. 23 Fed. Rep. 858; Kennedy v. Indianapolis, C. & L. R. R. Co. 3 Fed. Rep. 97; s. c. 2 Flippin, 704; Melendy v. Barbour, 78 Va. 544.

[4] Davis v. Michelbacher, 31 North West. Rep. 160 (Sup. Ct. of Wis. 1887).

[5] Kennedy v. Indianapolis, C. & L. R. R. Co. 3 Fed. Rep. 97.

Persons having claims against property in the hands of a receiver, are not required to institute a new action to enforce them, but, instead of asking leave to bring such actions, they may intervene in the original suit by petition and have their rights adjudicated, and this is the common practice.[1]

Claims which assert an equitable title to property in the receiver's hands are more conveniently tried by intervening petition in the original action, than by a separate action;[2] but if the claim be one sounding in tort, a court of law is the better forum and leave will be given to sue in a new action.[3]

If, when leave to sue is asked, it appear that the case is plain and that there is no necessity for instituting a new suit, the court may itself proceed to a final determination.[4]

An order denying an application to sue a receiver will be affirmed unless there has been an abuse of discretion.[5]

Section 657. **Want of Leave to Sue May Affect the Jurisdiction of Other Courts.**—The right of the court which appoints a receiver to punish, as for a contempt, those who bring suits against its officer without first obtaining its leave to do so, and to enjoin or stay the proceedings being, as we have seen, well settled, a further question arises concerning the power and duty of the courts in which such suits are brought. Does the want of leave to sue a receiver affect the jurisdiction of the court in which the suit is pending? Will the court proceed in disregard of the rights of the court making the appointment? This question has been passed upon by the supreme court of the United States in favor of the rule that the want of leave to sue affects the jurisdiction of the court in which the suit is brought, and that a plea of want of leave is to be sustained.[6]

This rule seems to be founded upon principle, and as the court intimated, is necessary to prevent one creditor or set of creditors from obtaining undue advantage over others in the enforcement of their claims; otherwise courts outside the jurisdiction of the court

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[1] Andrews v. Stanton, 18 Bradw. 163, 165; Olds v. Tucker, 35 Ohio St. 581; Meara's Adm'r v. Holbrook, 20 Ohio St. 137.

[2] Porter v. Kingman, 126 Mass. 141.

[3] Palys v. Jewett, 32 N. J. Eq. 302.

[4] Lehigh Coal & Navigation Co. v. Central R. R. Co. 38 N. J. Eq. 175.

[5] Meeker v. Sprague, 5 Wash. 242.

[6] Barton v. Barbour, 104 U. S. 126, which came up on error from an order overruling a demurrer to a plea averring that the plaintiff had not obtained leave to bring and maintain the suit. The court affirmed the action of the court below, the supreme court of the District of Columbia.

which appointed the receiver might proceed to judgment and sell the property within their reach under execution, and the appointing court would be powerless to prevent the injustice. The rule has been followed by a state court, which also held that it is necessary, for one who obtains leave to sue a receiver to allege such leave in his complaint or declaration, and that the failure to make such allegation is fatal on demurrer.[1]

The rule above stated has, however, been strenuously opposed. In the leading case of Kinney v. Crocker,[2] the record fails to show that any plea to the jurisdiction on account of want of leave to sue was filed, but it appears that the court was asked to instruct the jury that, unless they found that plaintiff had obtained leave to sue, he could not recover. The receiver was an officer of the federal court, and the evident trend of the opinion was in favor of protecting the jurisdiction of the state courts against the encroachments of the federal courts. It took the ground that while a court which appoints a receiver may draw to itself all controversies to which the receiver is a party, it does so only by acting directly upon the parties, as, by proceedings in contempt, or by injunction or stay of proceedings, and that, if its authority in equity is not interposed, the jurisdiction of other courts is not affected.

This doctrine was followed in a strong opinion by Judge Brewer in St. Joseph & Denver City R. R. Co. v. Smith,[3] and in Allen v. Central Railroad Co. of Iowa.[4] The ruling in these cases was reviewed, and unfavorably criticized by a federal court in Thompson v. Scott,[5] in which, however, the question was discussed upon an order to show cause why a party should not be punished for contempt in bringing a suit in a state court without leave.[6]

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[1] Keen v. Breckenridge, 96 Ind. 69.

[2] 18 Wis. 74. Approved by Mr. Justice Miller in his dissenting opinion in Barton v. Barbour, 104 U. S. 136.

[3] 19 Kan. 225. In this case the appearance of the receiver was entirely voluntary; and no separate plea to the jurisdiction was filed. The question arose upon an allegation in the answer that the defendant was a receiver appointed by a federal court, with a prayer for dismissal.

[4] 42 Iowa, 683, which arose upon a record similar to that in the case of St. Joseph, etc., R. R. Co. v. Smith, *supra*, and in which the court also took the position that "there can be no room to question this conclusion; that in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law, etc., it is not necessary to obtain leave of court."

[5] 4 Dill, 508.

[6] Two other cases are found to be cited as sustaining the principle of Kinney v. Croker, 18 Wis. 74, viz.: Hills v. Parker, 111 Mass. 508, and Paige v. Smith, 99 Mass. 395. In the former case the ruling was that replevin may be brought against a receiver without leave, for property not belonging to the

Section 658. **Further as to the Effect on the Suit of Want of Leave to Sue the Receiver — The Rule in Federal and State Courts.**— In the case of Barton v. Barbour,[1] the supreme court of the United States rigidly applied to receivers of railroads the general rule, requiring leave of court to sue its receiver, declaring the granting of leave to be jurisdictional, and the want of it fatal to the suit. In this case the vigorous dissenting opinion of Mr. Justice Miller is worthy of serious consideration. In strong and persuasive language that eminent jurist declared against the majority opinion, asserting it to be "without support in authority and unsound in principle."[2]

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party whose assets he has, and which is not rightfully in his possession — a position which, however, was controverted in a *dictum* of the Supreme Court of the United States in Barton v. Barbour, 104 U. S. 126, 128. In Paige v. Smith, *supra*, the report makes no reference to the question of leave to sue. In Blumenthal v. Brainerd, 38 Vt. 402, it was held that the mere fact that parties are acting as receivers "cannot be recognized as a defence to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them, in matters of business conducted or carried on by them while acting as such receivers."

[1] 104 U. S. 126.

[2] The question was considered particularly in connection with receiverships of railroads, and Mr. Justice Miller's dissenting opinion is so very interesting that the following quotation from it is submitted:

"The rapid absorption of the business of the country of every character by legally authorized corporations, while productive of much good to the public, is beginning also to develop many evils. Not the least of these evils arise from the failure of the corporations to pay their debts and perform the duties which by the terms of their organization they have assumed. One of the most efficient remedies for the failure to pay debts, when it arises from the inability of the corporation to do so, is to place the corporation in the hands of a receiver, that its affairs may be wound up, its debts paid, and, if anything remains, it may be distributed among its stockholders. Of the beneficial operation of this mode of closing out an insolvent corporation there can be little doubt, and when this is done with dispatch, and the property of the concern is made to pay its debts and its dead body is buried out of sight as soon as possible, no objection can be made to the procedure, and all good citizens and all the courts should contribute, as far as they may, to this desirable object.

"In regard, however, to a certain class of corporations — a class whose operations are as important to the interests of the community as any other, and as intimately connected with their business and social habits — the creation of receiverships by courts of chancery, the powers conferred on the receivers, and the duration of their office, has made a progress which, since it is wholly the work of the courts and not of legislatures, may well suggest a pause for consideration. It will not be necessary to any observing mind to say that I allude to railroad corporations. Of the many thousand miles of railway in my judicial circuit, and of the fifty or more corporations who own or have owned them, I think I speak within limits in saying that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the road, collect its means and

Prior to the decision of the United States supreme court in this case Judge Caldwell, then of the federal district of Arkansas,

pay its debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He, generally, takes the road and all its appurtenances out of the hands of the company which is its owner; operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debt of the corporation, but quite as often adds to the sum of these debts, and injures the prior creditors by creating a new and superior lien on the property pledged to them. All this time the receiver, in the use of the company's road and rolling stock, is performing the functions of a common carrier of goods and passengers. He makes contracts and incurs obligations, many of which he fails to perform.

"The decision which has just been announced declares that for these failures he cannot be sued in a court of law. That, by virtue of his receivership, he and all his acts and the business operations of the road which he runs are exempt from the operation of the common law, and that parties who deal with him do so on the implied understanding that they abandon the right to have their complaints tried by jury or by the ordinary courts of justice, and can only obtain such relief as may be had at the hands of a master in chancery of the court which appointed the receiver.

"When a receiver is appointed to wind up a defunct corporation; when no power exists to make new contracts or enter upon the performance of new duties; when the sole duty of the receiver is to convert the property of the corporation into a fund for the payment of its debts, and for distribution among those who are entitled to it, a very strong reason exists why the court which appointed the receiver should alone control him in the performance of those duties, and in such cases the court of chancery has the undoubted right to protect its receiver by injunction against parties suing him in other courts, and by punishing such parties for contempt of the court.

"In the case before us the receiver is sued for his own tort in regard to a personal injury to plaintiff; for an act done by him or by his agents in the transaction of business as a common carrier, in which business he was largely and continuously engaged. Why should he not be sued like any one else for such a cause, in any court of competent jurisdiction? The reply is, because he is a receiver of the road on which plaintiff was injured, and holds his appointment at the hands of a Virginia court of chancery. If this be a sufficient answer, then the railroad business of the entire country, amounting to many millions of dollars per annum, may be withdrawn from the jurisdiction of the ordinary courts which have cognizance of other matters of like character, and all the disputes arising out of these vast transactions must be tried alone in the court which appointed the receiver. Not only this, but the right of trial by jury, which has been regarded as secured to every man by the constitutions of the states and of the United States, is denied to the person injured, and he is compelled, though his case be one with no element of equitable jurisdiction in it, to submit it to a court of chancery or to one of the masters of such a court.

"In actions for personal injuries, which have always been considered as eminently fitted for a jury, and especially in the assessment of damages, this constitutional right is denied because it is a receiver of a railroad and not its owners who has done the injury.

"Whatever courts of equity may

adopted the practice of providing in the order appointing a receiver of railroads that they might be sued in any court of competent jurisdiction without the leave of the appointing court being previously obtained, and declaring that the service of process on any station agent of the receiver within the territorial jurisdiction of the court from which it issued, should be equivalent to personal service on the receiver. This announcement was extensively criticised; but Judge Caldwell has had the satisfaction of an indorsement of his views by Mr. Justice Miller and their embodiment in an act of congress.[1] In support of the rule adopted by Judge Caldwell he gave lucid and convincing reasons.[2]

The rule announced in the majority opinion in the case of Barton v. Barbour has been followed in Virginia, where the omission to obtain the leave of the appointing court to sue is declared to be fatal to the jurisdiction of any other court to entertain such suit.[3] That the consent of the appointing court is a jurisdictional prerequisite to the maintenance of a suit against a receiver may be said to be the rule in the federal courts, except as abrogated by act of congress,[4] which is considered in the following section. But the federal circuit court for the southern district of New York relaxed the rule in a patent suit, Lacombe, J., saying: "The general rule

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have done to protect their receivers, and may do to protect the fund in their hands, it is no part of the duty of the courts of law to deny to suitors properly before them the trial of their rights which justice requires and which the constitution and the law guarantee."

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"It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might, in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law and no defence to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages.

"It is asserted by counsel, whose brief shows the extent of his research, that no case can be fouud where such a plea has been sustained in an English court. I regret to say that, in my opinion, the judgment just rendered here is without support in authority and unsound in principle."

[1] See section 659.

[2] Dow v. Memphis & Little Rock Railroad Co. 20 Fed. R. 260.

[3] Read v. Axtell, 84 Va. 231.

[4] Missouri Pacific Railway Co. v. Texas & Pacific Railway Co. 41 Fed. R. 311; Comer v. Felton (U. S. C. C. App.), 61 Fed. R. 731; Fullerton v. Fordyce (Mo.), 25 S. W. R. 587.

A suit in a state court against a receiver appointed by a federal court, without leave, has been held to be removable to the federal court because it involves a federal question. Evans v. Dillingham, 43 Fed. R. 177.

undoubtedly is that a court will not entertain jurisdiction of a suit against a receiver appointed by another court until the appointing court has given its consent that he be sued. This rule rests on principles of comity, and is considered essential for the protection of the receiver as an officer of the court appointing him against unnecessary and expensive litigation touching controversies wherein it may often be within the power of the appointing court to give ample relief to any person aggrevied. But the rule has its qualifications, and the case at bar does not fall within it. This suit is one under the federal laws, involving questions as to the validity and infringment of United States letters patent, which the state courts have no jurisdiction to determine. The federal courts can not assent to the proposition that they have no jurisdiction without leave of the state courts first obtained to enjoin individuals, even though they be officers of state courts, from infringing upon the rights of the owner of a patent." Here the receiver, who was made a party defendant, moved to dismiss the suit as to him.[1]

The weight of state adjudications, as well as of reason, favors the contrary rule. In the cases which declare that want of the consent of the appointing court is not fatal to the jurisdiction of the court to entertain the suit, the rule requiring such consent is recognized. The effect of suing a receiver without leave of the court appointing him is held to be no more than to subject the plaintiff to contempt or injunction proceedings.[2] The omission is declared to be the subject of waiver;[3] it is not jurisdictional.[4]

"The question," it has been said, "is one of contempt, and not of jurisdiction. The ordinary jurisdiction of other courts is in no way taken away or affected by the appointment of a receiver."[5]

In a recent Nebraska case it was declared that suing a receiver without leave does not render invalid the process of the court served on him, nor prevent the jurisdiction of the court in which he is sued from attaching to his person; that a judgment rendered against a receiver so sued is not void for want of jurisdiction, but the receiver having voluntarily entered his appearance must be presumed to have submitted to the jurisdiction of the court and to have waived the defence of being sued without leave of court which appointed

[1] Hupfeld v. Automaton Piano Co. 66 Fed. R. 789.

[2] Mulcahey v. Strauss, 87 N. E. R. 702.

[3] Mulcahey v. Strauss, 87 N. E. R. 702; Flentham v. Steward, 63 N. W. R. 924; Elkhart Car Works Co. v. Ellis, 113 Ind. 215; Fordyce v. Dixon, 70 Tex. 694.

[4] Lyman v. Central Vermont Railroad Co. 59 Vt. 167.

[5] Mulcahey v. Strauss, 80 N. E. R. 702.

him.[1] In New York it is held that service of process gives the court jurisdiction of the receiver, though the suit be commenced without leave, and that the remedy is either a stay of the proceedings on the part of the plaintiff, or to punish him for contempt, or both; and that upon such application the court may and will grant leave to continue the suit if it appear that the case is a proper one.[2]

The rule requiring leave of court to sue a receiver is said to be for the protection of the receiver; and, if he makes no objection, "it is difficult to perceive why any one else should be permitted to do so."[3]

In Minnesota it has been held that an action against a receiver without leave of court to recover money in his possession, can not be maintained.[4]

In an action against a receiver the petition must allege the granting of leave to sue, or it will be demurrable.[5]

Consent of a court to sue its receiver authorizes the continuance of the suit against his successor.[6]

Section 659. **Leave in Suits Against Federal Receivers—Act of Congress of 1887—Its Construction and Effect.**—The third section of the act of Congress of March 3d, 1887, is as follows: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."[7]

This is a wise and just enactment. Its importance and necessity were declared first by Judge Caldwell,[8] and then by Mr. Justice Miller,[9] and may be said to have resulted from the agitation of the subject caused by the earnest words of these eminent jurists.

[1] Flentham v. Steward, 63 N. W. R. 924.

[2] Hirshfield v. Kalisher, 30 N. Y. S. 1027.

[3] Tobias v. Tobias (Ohio), 88 N. E. R. 317.

[4] Schmidt v. Gayner (Minn.), 61 N. W. R. 333; rehearing granted, 62 N. W. R. 265, but same conclusion reached, though as to point involving leave of court found to be controlled by statute, which had been overlooked.

[5] Burk v. Muskegon Machine and Foundry Co. 98 Mich. 614; Steel Brick Siding Co. v. Same, 98 Mich. 616.

[6] Fordyce v. Dixon, 70 Tex. 694.

[7] 24 U. S. Stat. at large, 554; 25 Id 436.

[8] Dow v. Memphis & Little Rock Railroad Co. 20 Fed. R. 260.

[9] Barton v. Barbour, 104 U. S. 126.

The act includes "every receiver," and is not restricted in its application to receivers of railways. It applies to any act or transaction of the receiver "in carrying on the business connected with such property;" but declares that the suit "shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." The enactment has been considered and construed in a number of cases.

In an action in which service of process on a station agent of a railroad in the possession of a receiver was declared to be sufficient, Thayer, J., said: "The third section of the judicial act of March 3rd, 1887, authorizing suits to be brought against receivers of railroads without special leave of the court by which they were appointed, is intended, as we think, to place the receivers on the same plane with railway companies, both as respects their liability to be sued for acts done while operating the railroad, and as respects the mode of obtaining service."[1]

It has been adjudged by the supreme court of Illinois that the act includes a suit against a receiver based on the negligence of the employes of his predecessors.[2] In commenting upon the enactment the court said: "It is unnecessary to state in detail the defects and mischiefs in the administration of the law which this act of Congress was intended to remedy. Suffice it to say that it is the evident intention of the statute that a plaintiff who has a strictly legal right of action and a claim for * * * damages and enforceable against and payable out of the property which is in the possession and under the control of a receiver appointed by a federal court, shall not be deprived of his action at law and other rights of trial by jury. It was the legislative intention that the suits provided for in the act should be maintainable in respect of all acts and transactions of receivers in carrrying on the business connected with the property in their possession and control."

The act includes suits for damages caused by the negligence of the receiver's servants and agents.[3] The supreme court of the United States has held that the statute applies to a suit for damages caused before its enactment, whether commenced before or after the act was in force.[4]

[1] Eddy v. Lafayette, 49 Fed R. 807.

[2] McNulta v. Lockridge, 137 Ill. 270. Affirmed, 141 U. S. 327; the supreme court of the United States following closely the opinion of the supreme court of Illinois.

[3] Fullerton v. Fordyce (Mo.), 25 S. W. R. 587.

[4] Texas & Pacific Railway Co. v. Cox, 145 U. S. 593. *Contra*, Missouri Pacific Railroad Co. v. Texas & Pacific Railroad Co. 41 Fed. R. 311.

Of the section of the act under discussion Judge Caldwell has said: "This act was intended to correct abuses that had grown up under the old practice, some of which were pointed out before the passage of the act in the opinion of this court in Dow v. R. Co. 20 Fed. R. 267. The act abrogates the old rule on the subject of suing receivers. It is no longer unlawful to sue a receiver appointed by a United States court without leave of the court appointing the receiver. A court now has no discretion to say when its receivers may be sued. This act gives the right, without condition or qualification. It is a right not to be nullified, evaded or abridged. No conditions can be imposed on its exercise. The court must give effect to the act; it has no discretion to do anything else." [1]

The statute authorizes suits against federal court receivers in any court having jurisdiction of the subject matter of the litigation.[2]

In an intervening proceeding in the federal court for the eastern district of Louisana the concluding clause of the third section of the act was particularly considered. A judgment having been recovered in a Texas court against the receiver of a railroad, the plaintiff filed an intervening petition in the receivership proceeding in the federal court, and the question as to the conclusiveness of the judgment was presented. The federal court declared that the judgment was not conclusive, and reduced it from ten thousand to five thousand dollars.

It was said by Judge Pardee that the third section of the act of Congress merely dispenses with the necessity of obtaining leave of the federal court to sue its receivers in another court, and that the suit has the same status, and the judgment therein the same effect, as if permission to sue had been regularly granted by the appointing court. "However, this may be," he said, "it is clear that when a judgment is so obtained, and is brought to the court of original jurisdiction to be ranked as a lien upon the trust funds, such judgment is subject to its general equity jurisdiction; and the duties of determining the rightfulness of the judgment, including whether the amount is just, is still imposed upon this court, as it would be if it had ordered an issue tried at law; for this court must still, in the language of the statute, exercise a 'general equity jurisdiction, so far as the same shall be necessary to the ends of justice.' * * *

[1] Central Trust Co. v. St. Louis. Arkansas & Texas Railroad Co. 40 Fed. R. 426.

[2] Dillingham v. Anthony, 11 S W. R. 139; Texas & Pacific Railway Co. v. Johnson, 151 U. S. 81; s. c. 14 S. C. R. 250; Central Trust Co. v. East Tennessee, Virginia & Georgia Railway Co. 59 Fed. R. 528.

For this reason I am of the opinion that in the present intervention the court may inquire as to whether or not the intervenor has a lien, and, if so, the rank and amount thereof, and that in such inquiry the court is not concluded in any way by the verdict and judgment produced from the district court of Harrison county, Texas."[1]

The question as to the conclusiveness of a judgment against a receiver is considered in a subsequent section,[2] where it is clearly shown that such a judgment is conclusive aside from the congressional statute under discussion. The opinion of Judge Pardee in this particular is against the authorities and the plainest reason. It is desired to here consider the cases which discuss the effect of the enactment, particularly the last clause of the third section, upon the rule.

The United States Court of Appeals has declared that the provision, "such suits shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice," does not abrogate the rule which declares that a judgment against a receiver is conclusive and binding on the court in which the receivership proceeding is pending. This provision, it was said, applies "only to suits which seek to interfere with the receiver's possession of property and to process, the execution of which would have that effect; any process whether for the recovery of such property or for the enforcement and collection of a judgment out of it. These shall be subject to the control of the court appointing the receiver so far as the ends of justice may require. * * * The time when and the manner in which a judgment against the receiver shall be paid; the adjustment of equities between persons having claims against the property in his hands; the just distribution of funds according to the rights of the several parties interested in it — all must necessarily be under the control of the court having custody of the property by its receiver, and shall be subject to its general equity jurisdiction. This, we think, is the true meaning of the statute referred to. We can perceive no other reasonable interpretation of it. Any other interpretation would impute to Congress a very useless act."[3]

[1] Missouri Pacific Railroad Co. v. Texas & Pacific Railroad Co. 41 Fed. R. 311. Such was the construction given the act in question by Judge Pardee, though independently he held that it did not apply to a suit instituted before its enactment (an error, see above in this section) and that as the suit was brought without leave of court, the judgment was void.

[2] Section 721.

[3] Dillingham v. Hawk, 9 U. S. C. C. Ap. 101; s. c. 60 Fed. R. 494.

That the provision of the third section of the act in question, which declares that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed," does not abrogate the rule as to the conclusiveness of a judgment against a receiver, must be accepted as its proper and judicial construction.[1]

In Texas the federal court, in an intervening proceeding, having rejected a judgment rendered against the receiver in a state court, after his discharge and the return of the property to the company, the state court enforced the judgment against the corporation.[2]

In the receivership proceedings against the St. Louis, Arkansas & Texas Railway Company, Judge Caldwell had occasion to consider the authority of a court to reject or modify a judgment against its receiver. He said that the particular provision under consideration is merely declaratory of "previously existing law;" that a suit seeking to deprive a receiver of the possession of property would be subject to the equity jurisdiction of the appointing court; that a judgment against a receiver "is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver."[3]

The provision of the act permitting a receiver of a federal court to be sued without leave "in respect of any act or transaction of his in carrying on the business connected with such property," has received special judicial consideration. In denying the right of a sheriff to seize railroad property in the possession of a receiver the supreme court of the United States declared that the provision does not "restrict the power of the circuit courts to preserve property from external attack."[4] This comment upon the provision was cited as authority by the United States circuit court of appeals in denying the right of a suitor to institute and prosecute to final judgment an action of unlawful detainer against a receiver, without leave of the appointing court.[5] It was said that the act does not authorize a suit to dispossess a receiver of property without leave of the appointing court, and that the plaintiff was guilty of a "gross contempt."

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[1] Central Trust Co. v. East Tennesee, Virginia & Georgia Railway Co. 59 Fed. R. 523; Texas & Pacific Railway Co. v. Johnson, 151 U. S. 81; Garrison v. Texas & Pacific Railway Co. (Tex. Civ. Ap.), 30 S. W. R. 725.

[2] Garrison v. Texas & Pacific Railway Co. 30 S. W. R. (Tex. Civ. Ap.), 725.

[3] Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R 551. To same effect are Fordyce v. Withers, 1 Tex. Civ. App. 540; Dillingham v. Kelley (Tex. Civ. App.), 27 S. W. R. 806.

See article upon "Railroad Receiverships." 30 Am. L. Rev. 161.

[4] *Ex parte* Tyler, 149 U. S. 164.

[5] Comer v. Felton, 61 Fed. R. 781.

A suit by a stockholder to enforce a right of the corporation, in which the receiver of the company was made a defendant, was held not to be "in respect of any act or transaction of his in carrying on the business connected with such property," and could not be prosecuted against the receiver without leave of the appointing court.[1] The same has been said of a garnishment proceeding against a receiver.[2] But in a state court the provision has been declared to be sufficiently broad to permit a federal court receiver to be garnished without the consent of the court.[3] The reason given was that, while the act will not permit the receiver's possession of property belonging to the trust estate to be disturbed, the property sought to be reached was not that of the trust estate, but belonged to the defendant debtor; a debt due him by the receiver, who could have sued the receiver.[4]

The provision that a receiver may be sued without the consent of the court which appointed him "in respect of any act or transaction of his in carrying on the business connected with such property," is plain and without ambiguity, and is to be taken in the sense which its words clearly convey.

The phrase "carrying on the business," means the actual continuation of the business of the debtor in which the property was used. It means more than the mere administration of the estate, the sequestration of the property, adjustment of claims and distribution of the assets. Considering that the act is in derogation of a common-law rule, though a remedial statute, its history, and giving in its words their plain and ordinary meaning, it may be correctly said to apply only to acts and transactions of the receiver necessitated by the actual continuation of the debtor's business, the operation of the property by the receiver; not to acts and transactions of a receiver in merely sequestrating, possessing and administering the trust estate.

Subject to the conditions and restrictions specified in the act under consideration, a receiver of a federal court may be sued without the consent of the court of which he is an officer.[5]

From the foregoing authorities and the principles of interpreta-

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[1] Swope v. Villard, 61 Fed. Rep. 417.

[2] Central Trust Co. v. East Tennessee, Virginia & Georgia Railway Co. 59 Fed. Rep. 523.

[3] Irwin v. McKechnie (Minn.), 59 N. W. R. 987.

[4] As to issuing execution and payment of a judgment, see section 720.

[5] Paxson v. Cunningham, 11 U. S. C. C. App. 111; s. c. 63 Fed. R. 132; Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 40 Fed. Rep. 426; Fullerton v. Fordyce (Mo.), 25 S. W. R. 587; Fordyce v. Withers, 1 Tex. Civ. App. 540; Ball v. Mabry, 91 Ga. 781.

tion the congressional statute under consideration may be said to support the following propositions:

1. A suit may be instituted against a receiver appointed by a federal court, and prosecuted to final judgment without the consent of the court, the subject matter of which arose out of some act or transaction of the receiver, his predecessor, or the employes and agents of either of them, in the actual operation of the property in his possession and continuation of the business for which such property was used.

2. A suit against a receiver of a federal court which has not for its object the vindication of a wrong or the enforcement of a right arising from some act or transaction of the receiver or his predecessor, or the employes and agents of one of them, in the actual operation of the property in his possession and continuation of the business for which such property was used, without the consent of the court, can not be maintained, and, according to the rule of the federal judiciary, a judgment rendered in such suit will be void, because of want of jurisdiction.

3. The provision of the act that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed," is, in the words of Judge Caldwell, merely declaratory of "previously existing law." It continues the power of the court so far as the possession, payment and distribution of the trust fund are concerned, but does not abrogate the rule that a judgment rendered against a receiver by a court of competent jurisdiction is conclusive as to its amount and the receiver's liability.[1]

Section 660. **Granting Leave to Sue a Receiver is not an Adjudication upon the Merits—The Receiver's Defence.**—When a court is asked to give leave to sue its receiver it may, and usually must, examine into the merits of the claim to ascertain whether a suit is necessary or proper for its adjudication, but such examination and the order made upon it can not be used by either party as in any way affecting the merits of the case. The order simply permits a judicial investigation to be made; the examination is not itself a trial, nor is the decision an adjudication upon the merits. So it has been decided that a cause of action against a corporation for a breach of contract accruing prior to the appointment of a receiver cannot be enforced against the receiver until the corporation is adjudged dissolved, and that the order permitting the receiver to be

[1] See section 721.

sued is not an adjudication of his liability.[1] When leave to sue a receiver is given, his right to set up any defence to the action that he may have, is not in any way restricted. He may make his defence by plea, answer, or demurrer.[2] If he can avail himself fully of a defence by an answer, the court may refuse to order a stay of proceedings for want of leave to sue.[3]

Section 661. **Leave to Sue a Receiver in Another Court — State and Federal Courts.**—As a general rule leave to sue a receiver in any court other than the one which appointed him will not be granted if suit can be conveniently brought in the latter; it is only when special facts and circumstances are shown to exist that the court will allow such a suit to be brought.[4] When it appears that the question to be determined is a necessary part of the original controversy, there is an especial reason for refusing leave to sue in another court, for otherwise there might be presented serious questions of conflicting authority. The proper course is by intervention in the original suit.[5]

If a federal court in equity grants permission to sue a receiver for damages for personal injuries, such permission does not confer jurisdiction upon the court on its law side to entertain the case, if, otherwise, it has no jurisdiction; as, e. g., on account of the citizenship of the parties. The permission relates to the court in equity only.[6] Where the highest court in a state had held that assignments for the benefit of creditors, without preferences, were valid and unassailable under the National Bankruptcy Act, but the federal courts in that state had held the reverse, a state court refused to allow an assignee in bankruptcy to sue its receiver in the federal court for the property in his hands.[7]

An action can be brought in a state court against a receiver of a railroad by permission of the United States circuit court which appointed him, for the breach of a contract made by the railroad before the appointment of the receiver, but the judgment of the state court can not be enforced against the property of the corporation in the hands of the receiver; it must be presented to the United States court for allowance, and the latter court will deter-

[1] Fleischauer v. Dittenhoefer, 49 N. Y. Super. Ct. 311.

[2] Davis v. Duncan, 19 Fed. Rep. 477.

[3] Jay's Case, 6 Abb. Pr. 293.

[4] Matter of Platt, 52 How. Pr. 468; Meredith Village Savings Bank v. Simpson, 23 Kan. 414.

[5] Central Trust Co. v. Wabash, St. Louis, etc., R. R. Co. 23 Fed. Rep. 858.

[6] Palmer v. Scriven, 21 Fed. Rep. 354.

[7] Matter of Platt, 52 How. Pr. 468.

mine the manner and time of paying it out of the assets of the road.[1]

A receiver appointed by a federal court in one state may, with leave of the court, be sued in a court of another state.

Because a receiver may be sued in another court it does not follow that that court may determine matters which are within the discretion of the court appointing the receiver.[2]

Section 662. **Permission to Sue in Another Court may be Refused — Revocation of Leave to Sue.**— In granting leave to sue, the court may require that the suit be brought in its own jurisdiction, and may refuse permission to sue in another court. Where such an order was made, and the plaintiff, after instituting the suit, took proceedings to remove the cause to a federal court, the action of the court which granted the order, in revoking it, of its own motion, and in dismissing the action, was held to be proper and not error.[3] Where a suit is brought against a receiver by leave of court which is improvidently granted, it is proper to revoke the order granting leave, and to dismiss the action.[4]

Section 663. **Leave to Sue a Receiver is Not Necessary in Suits for Property not Rightfully in his Possession, nor in those Based on Unofficial Acts.**—While the courts which hold property by their officers, the receivers, are in general zealous in protecting them from unathorized suits, they will not shield them against actions for property of which they are not authorized or directed to take possession by the decree of the court. So where a receiver of a railroad had possession of an engine in which the railroad corporation had no interest, although it was used on the line, it was held that its owner might maintain replevin against the agent of the railroad corporation, who was the agent of the receiver, without first obtaining leave of the court which appointed the receiver.[5] So, too, if the receiver take and hold the property which does not pertain to his office, and is a mere trespasser, he may be sued therefor in any court of competent jurisdiction, and the court which appointed

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[1] Harding v. Nettleton, 86 Mo. 668.

[2] International and Great Northern R. R. Co. v. Herndon (Tex. Civ. Ap.), 33 S. W. R. 377.

[3] Meredith Village Savings Bank v. Simpson, 22 Kan. 414.

[4] Henderson v. Walker, 55 Ga. 481, where leave had been given to an employe to sue for injuries resulting from the negligence of fellow-employes, and for which the receiver was held not to be liable.

[5] Hills v. Parker, 111 Mass. 508. But see a *dictum*, *contra*, in Barton v. Barbour, 104 U. S. 126, 128.

him will not interfere by injunction, because its permission to bring the suit was not first obtained.[1]

Consent of a court is not necessary to maintain a suit against its receiver for a personal liability and in his personal capacity.[2]

Section 664. **Where There is an Injunction Against Suing the Receiver.**—Where a receiver of a company was appointed in an action by a stockholder against the company, and the order restrained all persons from bringing or prosecuting a certain class of proceedings against it, including those for the foreclosure of mechanic's liens, or in any manner interfering with its assets until the further order of the court, it was held that a claimant who sought to foreclose such a lien was bound by the order, and that his motion for leave to commence an action against the receiver to enforce his lien could not be made until such order was vacated or modified; but that an application to vacate or modify the order might be joined in one motion with a request for leave to sue.[3]

Section 665. **Of the Notice of Application for Leave to Sue a Receiver—Leave After Discharge.**—As the granting of leave to sue a receiver is practically only the permission of the court that claims against him may be investigated and determined by legal methods in a competent tribunal, and as such permission does not affect the right of the claimant, in proper cases, to join as defendants, the owner of the property in his keeping, or other parties, it follows that notice of the application for leave to sue a receiver need not necessarily be given to the parties in the original suit, but that notice to the receiver is sufficient to enable the court to make a valid order. Accordingly it has been held that an order granting leave to sue was sufficient when made upon notice to the receiver alone.[4]

If a receiver has notice of a claim against him, and he be afterwards discharged, without having given notice of the motion and

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[1] *In re* Young, 7 Fed. Rep. 855. In Curran v Craig, 22 Fed. Rep. 101, the receiver appointed by a state court wrongfully took possession of a patent, and a federal court, in an action for infringement to which a plea to the jurisdiction was make, held, that although the receiver could be sued personally in such a case without leave of the court which appointed him, comity required that the state court ought to have an opportunity of correcting its error, and withheld judgment to allow the plaintiffs to apply to that court for a modification of its order.

[2] Carrey v. Spencer, 36 N. Y. S. 886.

[3] Wilkinson v. North River Construction Co. 66 How. Pr. 423, 427, 428 (N. Y. Sup. Ct. Special Term, 1884).

[4] Potter v. Bunnell, 20 Ohio St. 150, 159.

discharge to the parties holding the claim, such parties may obtain leave to bring suit against him, notwithstanding his discharge; and a refusal to grant leave is appealable under the practice in New York.[1]

II.

SUITS BY RECEIVERS.

A.

Of the Receiver's Right to Sue in General.

Section 666. **A Receiver Succeeds Generally to all the Rights of Action Possessed by his Principal.**—As a general rule all rights of action which belong to the party whose property is put into the hands of a receiver, are transferred to the receiver by virtue of his appointment. He succeeds to all such rights for the purposes of enforcing them.[2] A receiver of an insolvent corporation has been held to be its "legal representative"[3] within the meaning of the revised statutes of. the United States, section 5198, providing for the recovery of twice the amount of unlawful interest paid to a national bank, by "the person by whom it was paid or his legal representatives."

Obligations which have been fully paid or otherwise legally extinguished can not be litigated by receivers subsequently appointed, in any action either equitable or legal.[4]

Actions in which a corporation is plaintiff, which are pending when a receiver is appointed for the corporation, should be continued in his name, by an order obtained upon a summary application.[5]

He may sue in a federal as well as a state court.[6]

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[1] Miller v. Loeb, 64 Barb. 454; where an order refusing leave was reversed with costs.

[2] Coope v. Bowles, 28 How. Pr. 10; s. c. 42 Barb. 87; Griffin v. Long Island R. R. Co. 102 N. Y. 449; Curtis v. McIlhenny, 5 Jones Eq. (N. C.) 290.

[3] Barbour v. National Exchange Bank, 12 North East. Rep. 5. (Ohio Sup. Ct. April, 1877.) It had been previously held in New York that a receiver might maintain a suit to avoid usurious transactions entered into by the company which he represented. Leavitt v. De Lanney, 4 Sandf. Chan. 281. As the right of action in such case is dependent upon statute, the requirements of the statute must be complied with—as where the time within which suit may be brought is prescribed. Palen v. Johnson, 46 Barb. 21; Palen v. Bushnell, Id. 24. In Curtis v. Leavitt, 15 N. Y. 44 (1857), it was, in effect, decided that the usury laws, so far as regards corporations, had been repealed by the act of 1850, ch. 172.

[4] Cooper v, Bowles, 28 How. Prac. 10.

[5] Talmage v. Pell, 9 Paige, 410. See section 671.

[6] Chambers v. McDougal, 42 Fed. Rep. 694.

Section 677. **The Appointment Does not Affect Contracts or Other Rights of Action.**—The receiver of an insolvent corporation can not impeach or disaffirm the lawful and authorized acts of the corporation.[1] The appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of the receiver and others; he has no greater rights or advantages than those possessed by his principal. If a claim which he seeks to enforce, as, e. g. a promissory note, is, at the time he is appointed, not capable of being sued upon by the corporation whose assets he has, he will not be permitted to maintain a suit upon it until he has done whatever may be necessary to remove the incapacity.[2] So also, he cannot maintain an action to recover property which had been sold under execution before he was appointed.[3] But as the representative of the creditors of an insolvent corporation, he may object that a judgment against the corporation by confession was not obtained in such a manner as to be binding upon it, and may have such judgment set aside on motion;[4] and he may sustain an action to vacate and set aside a judgment on the ground that it was obtained without consideration, by collusion with the offieers of the corporation, and in fraud of creditors.[5]

Section 668. **A Receiver Must Pursue Appropriate and Existing Remedies.**—The fact that a person is an officer of the court entitles him to no privileges not accorded to other suitors, and in seeking relief he must commence his action by the same process that other suitors are required to employ. So where a receiver of an insolvent bank sought by petition to recover moneys of the bank received by one of its creditors, subsequently to his appointment, it was held that he could have no relief by petition, but only by bill.[6] Similarly where the assignee of funds in an action in partition had procured an order directing the county treasurer, in

[1] Hyde v. Lynde, 4 N. Y. 387; Brouwer v. Harbeck, 1 Duer, 114.

[2] Williams v. Babcock, 25 Barb. 109. In this case the note sued upon was given as part of the premium for a policy of insurance in a mutual insurance company, in case there should be an assessment and notice thereof. As no assessment had been ordered by the company and no notice given before the receiver was appointed, he was not allowed to sue upon it without having taking the proper steps to fix the obligation. Bell v. Shibley, 33 Barb. 610; Thomas v. Whallen, 31 Barb. 172.

[3] McIlrath v. Snure, 22 Minn. 391.

[4] Stokes v. New Jersey Pottery Co. 46 N. J. Law, 237, 243, citing Vail v. Hamilton, 85 N. Y. 453.

[5] Whittlesey v. Delaney, 73 N. Y. 571; Porter v. Williams, 9 N. Y. 142.

[6] Receiver of State Bank v. National Bank of Plainfield, 34 N. J. Eq. 450, 458.

whose hands they had been placed by an order of court, to deliver them to him, the receiver of the assignor, afterwards appointed in supplementary proceedings, was not allowed to obtain title to the bonds by an order setting aside the order of delivery, the court holding that his right to them should have been tried by an action.[1]

Where a receiver was appointed in an action for the dissolution of a company, and before his qualification, the property of the company was attached by a creditor, and the receiver obtained an order upon the sheriff to show cause why such attachment should not be set aside, it was held, upon appeal from an order denying the motion, that he had mistaken his remedy, as his motion was made in an action to which neither the receiver, sheriff nor attaching creditor was a party, and that he must bring an independent action to avoid the attachment, making the creditor a party in order to give him an opportunity to protect his rights.[2]

Section 669. **The Legal or Equitable Character of Claims Remains Unchanged — Conduct of the Litigation — Interpleader, Etc.** — If the right of action be legal in its nature, the receiver will not be allowed to assert it by a proceeding in equity. Legal and equitable rights must be enforced by their proper legal and equitable remedies, notwithstanding the receiver is the officer of a court of equity.[3] The fact that he is the officer of the court confers upon him no privileges, nor does it impose upon him any restrictions as to the conduct of the litigation after it is begun. He is as free to manage it as is any other litigant, and he may appeal from an adverse decision without being made liable to the imputation of bad faith or of mismanagement of his trust.[4]

The receiver of a federal court has no greater power to bring suits than one appointed by a state court.[5] A receiver may maintain a suit to interplead between two claimants to the same fund in his hands, and meantime may render his accounts and pay the balance into court to await the determination of the action.[6] A receiver appointed under the New Jersey act concerning executors, may file a bill to set aside a fraudulent assignment of mortgages made after the debtor had incurred the debt, but before judgment, and in the

[1] Matter of Castle, 2 N. Y. State Rep. 362.

[2] Andrews v. Paschen, 67 Wis. 43; s. c. 30 N. W. Rep. 712 (1886).

[3] Freeman v. Winchester, 18 Miss. 577. But see *contra*, Terhune v. Bell, 9 Atl. Rep. 111 (Ch. of N. J. 1887).

[4] Devendorf v. Dickinson, 21 How. Pr. 275.

[5] Battle v. Davis, 66 N. C. 252.

[6] Winfield v. Bacon, 24 Barb. 154.

same bill may pray for a discovery as to his property and insolvency, the inquiry as to his insolvency being looked upon as pertinent to the question of fraud.[1]

Section 670. **When Right of Action Accrues — Effect of Not Filing the Oath or Executing Bond — Change in Receivers.**— If the order appointing a receiver direct him to collect and, if necessary, to sue for the hire of property, his right of action relates back to the beginning of the title in the party for whose property he is receiver. If substituted in place of the owners of the property, he acquires all their rights by subrogation.[2] A statute which requires a receiver of an insolvent bank to take an oath of office is merely directory. The omission to take such an oath before the commencement of a suit does not incapacitate him to sue.[3]

But, since the execution of a bond with sureties, as required by the order of appointment, is necessary in order to vest the title of property in him, his failure to execute such a bond is sufficient to authorize a non-suit in an action instituted by him as receiver.[4] On the other hand a mere informality in the execution of the bond of a receiver in a creditor's suit, is of no avail to the defendant in an action brought by the receiver. The judgment creditor may, however, take advantage of such informality.[5]

A change in receivers, either because of resignation or removal, does not abate the action.[6]

Section 671. **Of Suits Against Officers of Corporations.**— A receiver of a corporation represents the rights, both of creditors and stockholders, and may assert their rights when affected by the fraudulent or illegal acts of its managing directors. He may repudiate illegal transfers of the corporate effects, and illegal contracts made by the officers of an insolvent corporation, in its name and professedly on its behalf.[7]

For any willful breach of their trust or misapplication of the corporate funds, or for any gross neglect of, or inattention to their official duties, directors of a bank are liable in a court of equity to the

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[1] Bergen v. Littell, 41 N. J. Eq. 18; s. c. 2 Atl. Rep. 614.

[2] Hardwick v. Hook, 8 Ga. 354.

[3] Dayton v. Borst, 7 Bosw. 115.

[4] Johnson v. Martin, 1 Thomp. & C. (N. Y.) 504.

[5] Morgan v. Potter, 17 Hun, 403.

[6] Hegewisch v. Silver, 140 N. Y. 414.

[7] Leavitt v. Palmer, 3 N. Y. 19; Gillet v. Moody, 3 N. Y. 479; State of Ohio v. Leavitt, 7 N. Y. 328; Bank Commissioners v. St. Lawrence Bank, 7 N. Y. 513; Leavitt v. Tylee, 1 Sandf. Ch. 207; Leavitt v. Yates, 4 Edw. Ch. 134; Brouwer v. Hill, 1 Sandf. Super. Ct. 629; Furniss v. Sherwood, 3 Sandf. Super. Ct. 521; Austen v. Daniels, 4 Denio, 299.

corporation in the first instance, and if the corporation be insolvent and its affairs in the hands of a receiver, he may maintain the litigation, but if he refuse to do so, then any person aggrieved may sue.[1]

A receiver of an insolvent corporation may bring a suit in equity to recover back from its officers assets which they have converted, and the officers will not be heard to say that such assets are not needed for the payment of lawful debts of the corporation.[2] He may also bring an action to set aside illegal transfers or incumbrances created by the officers or by the corporation, and it is proper to stay an action brought by a creditor to enforce such debts or liens as are invalid or illegal.[3] Where the receiver of an insolvent bank refused to bring suit, it was held that a creditor and stockholder could, for the benefit of himself and of such other creditors and stockholders as should elect to join him, maintain a suit against the president and directors for gross neglect and mismanagement in office.[4]

Section 672. **Of Suits Against Stockholders for Unpaid Subscriptions.** — It is not only the right but the duty of a receiver of an insolvent corporation to collect unpaid subscriptions to its capital stock, for the benefit of its creditors to such an extent as may be necessary to pay their lawful claims in full.[5] In New York the form of action used by the receiver in enforcing his rights in this respect was formerly in equity,[6] but may now, by statute,[7] be either at law or in equity. In Mississippi it is at law.[8] As a necessary incident to his power to collect unpaid stock subscriptions, the receiver has the power to make calls upon the stockholders for such amount as may still be due, or may be required.[9]

[1] Ackerman v. Halsey, 37 N. J. Eq. 356, 361.

[2] McCarty's Appeal, 1 Cent. Rep. 147 (Sup. Ct. of Penn.).

[3] Hubble v. Syracuse Iron Works, 42 Hun, 182, 186 (1886).

[4] Ackerman v. Halsey, 37 N. J. Eq. 356.

[5] Dayton v. Borst, 31 N. Y. 435; Nathan v. Whitlock, 9 Paige, 152; Frank v. Morrison, 58 Md. 423; Chandler v. Brown, 77 Ill. 333; But see Hadley v. Russell, 40 N. H. 109; Coleman v. White, 14 Wis. 700; Umstead v. Buskirk, 17 Ohio St. 113.

[6] Sagory v. Dubois, 3 Sandf. Ch. 466.

[7] N. Y. 3 Rev. Stat. ch. 8, art. 3, § 69. The remedy so provided has been held to be merely cumulative. Mann v. Currie, 2 Barb. 294; Harmon v. Paige, 62 Cal. 448.

[8] Freeman v. Winchester, 18 Miss. 577.

[9] Dane v. Young, 61 Me. 160; Hall v. United States Ins. Co. 5 Gill, 484. In this case the receiver was given the same power to make calls as was possessed by the officers of the corporation before his appointment. Hightower v. Thornton, 8 Ga. 486; Johnson v. Laflin, 5 Dill. 65; Rankine v. Elliott, 16 N. Y. 377. In England under the Railway

The receiver has the same powers, as regards stockholders, which were possessed by the corporation before he was appointed,[1] but he has no greater power than the corporation had to collect subscriptions.[2] So, where property has been transferred to a corporation, by arrangement, at an over valuation in payment for stock which has been issued as fully paid, since the transaction can not be impeached except for fraud upon the corporation, a receiver of the corporation appointed long after the transaction, will not be allowed to maintain a suit to impeach or set it aside.[3]

The proper person for a receiver, under the laws of New York, to proceed against for balances due upon stock, is he in whose name the stock stands upon the books of the corporation as the owner thereof, although he may, in fact, hold the stock as trustee for another, or have assigned it, provided no transfer has been made upon the books.[4] It has also been held that the court can not give a receiver power to compromise claims in these cases,[5] and that a receiver who neglects to exercise his powers against shareholders may be compelled to do so by the creditors of the corporation.[6]

Section 673. **Of Suits Against Stockholders upon Other Claims.**—The receiver of an insolvent corporation may maintain a suit to recover money received by stockholders from the company for stock sold to it, and it is no objection to such a suit in equity that the creditors of the corporation had a remedy at law, since equity takes cognizance of all trusts, and its court is the proper tribunal to enforce the rights of beneficiaries under them.[7] It has been held in New York that claims for dividends improperly declared by an insolvent corporation do not belong to the receiver, but to the creditors, and that the right of action is in them.[8] Under the statute in Maine in order to enable the receiver of a

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Companies Act of 1867, a receiver has no such power. *Re* Birmingham, etc., Ry. Co. L. R. 18 Ch. Div. 155. See also Nathan v. Whitlock, 9 Paige. 152; Chandler v. Kieth, 42 Iowa, 99.

[1] Cutting v. Damerel, 88 N. Y. 410; Mean's Appeal, 85 Pa. St. 293. But he has no power to enforce statutory liabilities, Farnsworth v. Wood, 91 N. Y. 308.

[2] Billings v. Robinson, 94 N. Y. 415, affirming s. c. 28 Hun, 122. *Cf.* Cleveland v. Burnham, 55 Wis. 598.

[3] Coffin v. Ransdall (Sup. Ct. of Ind. March, 1887); 1 Ry. & Corp. L. J. 326. See also Scovill v. Thayer, 105 U. S. 143; Mills v. Scott, 99 U. S. 25.

[4] Mann v. Currie, 2 Barb. 294, 299.

[5] Chandler v. Brown, 77 Ill. 333.

[6] Gas Light Co. v. Haynes, 7 La. Ann. 114; New Orleans Gas Light Co. v. Bennett, 6 La. Ann. 457; Starke v. Burke, 9 La. Ann. 341; Atwood v. Rhode Island Agricultural Bank, 1 R. I. 376; Eppricht v. Nickerson, 78 Mo. 482. *Contra*, Mann v. Pentz, 3 N. Y. 415.

[7] Crandell v. Lincoln, 52 Conn. 73.

[8] Butterworth v. O'Brien, 39 Barb. 192.

bank to maintain in behalf of its claimants an action against the stockholders for contribution, where losses by official mismanagement are alleged as a specific ground for enforcing such liability, it must appear from a judicial determination that there has been a loss thus occasioned in the capital stock, and that the directors are unable to make good the loss.[1]

Section 674. **Of Actions for the Possession of Personal Property.**—It has been formally adjudicated that a receiver, who has had possession of property by virtue of his appointment as such receiver by a competent court, may maintain an action of detinue for the property. Although such an action could not be maintained if grounded merely upon the right of property which may be claimed to vest in him by virtue of his appointment, yet, as a mere right of possession is a sufficient basis upon which to found the action, and as he is entitled to the possession, he may avail himself of this remedy.[2]

A receiver appointed in supplementary proceedings takes only an equitable right of redemption in chattels mortgaged by the judgment debtor when reduced to possession by the mortgagee before the commencement of the proceedings, and he cannot maintain replevin for such chattels against the mortgagee.[3] In a recent case in England it was held that a receiver of a pawnbroker's business was not entitled to the possession of redeemable pledges as against the sheriff who held them by virtue of a levy under execution, made after the appointment of the receiver, but before he had perfected his security.[4]

Section 675. **Of Actions for the Conversion of Property by a Judgment Debtor — Garnishment of Plaintiff.**—A receiver of the property of a judgment debtor may maintain an action against the debtor for property converted by him after the appointment of the receiver; but if the judgment debtor be in possession of the personal property at the time of the appointment, he having previously given a mortgage upon it to secure the purchase money, and the receiver have allowed the mortgage to become absolute after his appointment, he cannot maintain an action against the judgment debtor for its conversion, although the property is still in his possession by sufferance of the mortgagee.[5]

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[1] Hewett v. Adams, 50 Me. 271.

[2] Boyle v. Townes, 9 Leigh. (Va.) 158.

[3] Campbell v. Fish, 8 Daly (N. Y.) 162.

[4] *Re* Rollason, 56 L. T. (N. S.) 308 (April, 1887).

[5] Gardner v. Smith, 29 Barb. 68.

As a receiver represents all parties to the action in which he is appointed, he may, in a suit brought by him on behalf of the estate, proceed against the plaintiff in the original suit by garnishment, as if he were a stranger.[1]

Section 676. **Of Actions for Rent and for Purchase Money.**— A receiver appointed of the estate of a defendant, part of which is in property yielding rent, should notify tenants of his appointment, in order to be able to sue for the rents in case they are not paid. The tenant is entitled to the notice that he may not, from want of knowledge of the appointment, continue to pay rent to the owner; such notice is also necessary to protect the estate and secure whatever is due to it. It has been held that unless the receiver give such a notice to the tenant he can not maintain a suit for the rent.[2]

In a New York case, in which a receiver had been appointed for one who had executed a deed absolute upon its face, but as between the parties, intended to be a security for a loan, it was held that the receiver could maintain an action for the balance of the purchase money due, after deducting the sum loaned, the grantee in the deed having disposed of the property to an innocent purchaser.[3]

Section 677. **Of Suits for Unpaid Subscriptions.**— It has been held in Wisconsin that where a receiver has been appointed for the care of funds and property which had been subscribed by a number of persons for a certain object, the appointment having been made in proceedings in equity instituted by a part of the subscribers, the receiver has the same right to compel payment of such subscriptions as are unpaid as is possessed by other subscribers. The fact that he represents all the subscribers, including those from whom he seeks to enforce payment, does not constitute a valid objection to his right to bring the action.[4]

Section 678. **Rights of Action Under Certain Statutes.**— Under the code of civil procedure of New York, a receiver of the prop-

[1] McDonald v. Carney, 8 Kan. 20.

[2] Hunt v. Wolfe, 2 Daly, 298.

[3] Van Duesen v. Worrell, 4 Abb. Ct. App. Dec. 473. See Foster v. Townshend, 12 Abb. Pr. (N. S.) 469, as to a receiver's right under the N. Y. Code of Civil Procedure to set aside a fraudulent conveyance by the defendant, when no assignment to the receiver has been made. Under the Wisconsin code it has been held that a receiver in charge of the estate of the defendant in a suit for divorce, after a decree of alimony has been pronounced, can maintain an action to set aside a fraudulent conveyance of real property made by the defendant to avoid the decree. Barker v. Dayton, 28 Wis. 367.

[4] Lathrop v. Knapp, 27 Wis. 214; s. c. 57 Wis. 307.

erty of a judgment creditor may reach real property which his debtor paid for, but caused to be conveyed to another person, although his judgment never was a lien on the property, or, by reason of the lapse of time, has ceased to be a lien on any real property.[1] A receiver appointed under the statute of New Jersey concerning insolvent corporations, is the proper party to maintain an action against attaching creditors for possession of the property of the insolvent; the creditors at whose suit he was appointed have no standing to maintain such an action, especially if it be not shown that the receiver has refused to act.[2]

Where a statute enables a person, who is entitled to money collected by a sheriff in his official capacity, to have a judgment entered against the sheriff for the money so collected by him, upon a motion made for the purpose, the right to have the judgment entered upon motion is vested in the receiver of the person originally entitled to the money.[3]

Section 679. **Generally of the Receiver's Right of Action — Corporations — Individuals.**— A receiver can not maintain an action for the conversion of property of which he has never acquired possession, and as to which he does not show he is entitled to possession, beyond an averment that he was directed by the court to take such property into his possession, although he alleges that it has been wrongfully taken and converted by the defendant, yet he has such special or qualified interest in property of which he has taken possession, that for its conversion he may maintain an action.[4]

In the case of Thompson v. Greeley[5] the supreme court of Missouri gave extended consideration to the question of the right of a common law receiver of a banking corporation to enforce against its directors a liability for an illegal and improper loan and disposition of the bank's funds, which was answered in the affirmative, the receiver having been authorized and directed by the court appointing him to institute the suit. Such receiver may also, as sole complainant, file a bill to foreclose a mortgage given to the bank.[6]

Temporary receivers have power to collect and receive the debts, demands and other property of the corporation, to preserve the same, and, in a proper case, to sell or dispose of the property as di-

[1] Scoville v. Halladay, 16 Abb. N. C. 43, 46.

[2] Minchin v. Second National Bank, 36 N. J Eq. 436.

[3] Goss v. Southall, 23 Gratt. 825.

[4] Kehr v. Hall, 117 Ind. 405; Lansing v. Manton, 14 Nat. Bank Register, 127.

[5] 107 Mo. 577.

[6] Comer v. Bray, 8 So. R. 557.

rected by the court, and to maintain any action or special proceeding necessary and proper for these purposes, but no other.[1]

Generally speaking a receiver has only such rights of action as might have been maintained by the person over whose estate he is appointed, and to whose rights he succeeds. It is necessary for him to allege and set forth facts which show the right of action he represents.[2] He has, it has been said, power to sue on and enforce a contract notwithstanding the consideration for which it was executed was the doing of an act by the receiver which was in violation of the order of the court and a breach of his official duty.[3]

A receiver of an insolvent corporation may sue to avoid a chattel mortgage given by it and not filed as required by law. Such a receiver, it is said, has the same power and functions as a receiver in a creditor's proceeding or in proceedings supplementary to execution.[4]

Section 680. **Parties to Suits by Receivers.**— In New York the receiver of an insolvent bank was held to be a competent complainant in a bill to set aside an assignment made by the directors, although he stood, to a certain extent, in the place of the bank.[5] Under the statutes of Wisconsin the bank comptroller and not the receiver is the proper person to bring a suit upon a stockholder's bond;[6] but, where judgment upon such a bond was entered up by the bank comptroller under a warrant of attorney for that purpose, the judgment, if otherwise regular and just, may be allowed to stand, and may be enforced by a receiver subsequently appointed.[7] In New Jersey it was decided that when a receiver for the creditors and stockholders of a corporation files a bill, it is not necessary to make the creditors and stockholders parties.[8]

Where a receiver charged that the defendants as managers of a savings bank had improperly loaned the funds without adequate security, and that he had been compelled to accept in settlement of the loan securities which were, and ever since had been, worth a less sum than the amount of the loan, and sought to hold the defendants for the loss, it was held, on demurrer, that the loss was

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[1] Felter v. Maddock, 32 N. Y. S. 292.

[2] Daggett v. Gray (Cal.), 40 Pac. R. 959; Forker v. Brown, 30 N. Y S. 827.

[3] O'Gorman v. Sabin (Minn.), 64 N. W. R. 84. As to right of receivers to sue to set aside conveyances made by the debtor in fraud of his creditors see sections 297, 298, 455.

[4] Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works, 35 Minn. 543.

[5] Leavitt v. Yates, 4 Edw. Ch. 134.

[6] Rusk v. Van Nostrand, 21 Wis. 159.

[7] Van Steenwyck v. Sackett, 17 Wis. 645.

[8] Mann v. Bruce, 5 N. J. Eq. 413.

sufficiently averred although the securities had not been sold, and that the borrower was not a necessary party to the suit.[1]

Section 681. **A Judgment Obtained by a Receiver may be a Bar to Another Action.**— If a receiver be appointed at the instance of the plaintiff in an action, and, in his capacity as a receiver, brings an action for the benefit of the plaintiff and recovers a judgment, the proceedings have the effect of barring the plaintiff from a later suit upon the same cause of action. Although the party in interest has not appeared in the prosecution of such an action, he is regarded as having been represented by the receiver, and as having obtained the benefit of the suit to such an extent that further recourse to the courts upon the same claim is to be considered an unnecessary multiplication of suits.[2] So, too, where receivers of a banking corporation recovered judgment in a state court upon liabilities due to the bank, the judgment so obtained was held to be a complete bar to another action brought in another state in the name of the bank against the same defendants upon the same cause of action, notwithstanding the judgment was recovered in an action brought in the name of the receivers. In this case also the receivers were considered the representatives of the bank, so that the judgment recovered by them was of the same effect as if recovered by the bank itself.[3]

Section 682. **Liability for Costs.**— A receiver's liability for costs in actions instituted by him on behalf of the estate in his charge is similar to that of any other trustee — as e. g. an executor or administrator — who sues for the interest of an estate; but being an officer of the court, and presumably acting by its authority, he usually receives special consideration.

So it has been held that where he has been prevented from going to trial, by good and sufficient reasons, after having noticed the case for trial, he should not be required to pay costs personally, especially as he had evidently acted in good faith.[4]

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[1] Dodd v. Wilkinson, 41 N. J. Eq. 566, 581 (1886); s. c. 2 Cent. Rep. 245; s. c. *sub nom.* Wilkinson v. Dodd, 7 Atl. Rep. 337.

[2] Tinkham v. Borst, 24 How. Pr. 246.

[3] Bank of North America v. Wheeler, 28 Conn. 433.

[4] St. John v. Denison, 9 How. Pr. 433, where he was unable to go to trial on account of the absence of a material witness. See also Hubbell v. Dana, 9 How. Pr. 424. As to giving security for costs under the N. Y. code of procedure see Kimberly v. Stewart, 22 How. Pr. 281; Kimberly v. Goodrich, Id. 424; Kimberly v. Blackford, Id. 448. For the purposes of section 317 of the N. Y. code concerning costs (now incorporated in sections 3246 and 3271) the receiver represents himself and the estate

Where a bill filed by a receiver on behalf of creditors, under the advice of counsel, was, without fault of the receiver, dismissed upon the ground that its allegations of fraud were not supported by the proof, the costs were allowed to the receiver out of any funds which had come or might come into his hands.[1]

Where a receiver voluntarily intervened in litigation without funds to pay the costs, and it was shown that the claim which he wished enforced was not proper, held that he was personally liable for the costs.[2] And if a receiver institute a suit carelessly and without permission of the court, he may be charged personally with the costs, and without an affirmative motion for that purpose.[3]

B.

Of the Right of the Receiver to Sue in Another State.

Section 683. **Generally a Receiver Has No Extra-territorial Right in Bringing Suits.**— The general rule as to the right of a receiver to bring suits in the courts of other states than that in which he was appointed is well settled. It has been stated by Mr. Justice Wayne, in a leading case, to be that he "has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.[4]

The rule thus laid down by the supreme court of the United States has been followed by other courts with essential unanimity, and can hardly be said to be seriously questioned.[5] Applying this rule it was held that a receiver of the effects of a debtor appointed

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or fund of which he is receiver. and of which he has the custody and control, subject to the supervision of the court, and not the judgment creditors, under whose direction he had his appointment, unless they have directed or authorized the prosecution of the suit. McHarg v. Donelly, 27 Barb. 100.

[1] Tillinghast v. Champlin, 4 R. I. 173.

[2] Bourdon v. Martin, 26 N. Y. S. 878.

[3] *In re* Castle, 2 N. Y. St. R. 362.

[4] Booth v. Clark, 17 How. Pr. 322, 338.

[5] See generally Farmers & Merchants' Ins. Co. v. Needles, 52 Mo. 17; Hope Mutual Life Ins. Co. v Taylor, 2 Robert. (N. Y.) 278; Warren v. Union National Bank, 7 Phila. 156; Brigham v. Luddington, 12 Blatchf. 237; Hazard v. Durant, 19 Fed. Rep, 471; Graydon v. Church, 7 Mich. 36; Kilmer v. Hobart, 58 How. Pr. 452; Olney v. Tanner, 10 Fed. Rep. 101; s. c. on appeal, 21 Blatchf. 540; Bartlett v. Wilbur, 53 Md. 485. *Contra* Metzner v. Bauer, 96 Ind. 425; Runk v. St. John, 29 Barb. 585.

by a court in New York, had no right to file a bill in the District of Columbia for the purpose of obtaining possession of funds due to the debtor, the appellate court affirming the action of the court below in dismissing the bill.[1]

Section 684. **Application of the Rule.**—The rule has also been applied to a case where the receiver of an insurance company appointed by a court in Illinois brought suit in Missouri upon a note in favor of the company, the court in the latter state holding, upon demurrer, that the receiver, as such, could not maintain the action.[2] And where a citizen of one state attached a debt due to a foreign corporation, over which a receiver had been appointed by a court in the state of its domicile, it was held that the receiver could not come into the courts of the state in which the debt was attached and claim the fund, because they had no extra-territorial powers.[3]

This rule has also been adopted for the federal courts, because their jurisdiction is limited and local. Accordingly a receiver appointed by the federal court of one district has no right to sue in another federal district.[4] But where a suit was brought in the United States circuit court of Iowa by a judgment creditor and a receiver who was appointed in Illinois, the court thought it doubtful whether the receiver could maintain the action.[5]

Section 685. **Exception in Favor of Comity.**—While the incapacity of a receiver to bring suits in foreign jurisdictions is, as we have seen, well established, there is nothing to prevent the courts of other states or jurisdictions from permitting him, as a matter of

[1] Booth v. Clark, 17 How. 322, 328. The opinion of the court in this case states the reasons of its decision to be as follows: 'We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability.

[2] Farmers & Merchants' Ins. Co. v. Needles, 52 Mo. 17. See also Hope Mutual Life Ins. Co. v. Taylor, 2 Robert. (N. Y.) 278.

[3] Warren v. Union National Bank, 7 Phila. 156. In this connection see Willets v. Waite 25 N. Y. 577; Taylor v. Columbian Ins. Co. 14 Allen, 353; Hunt v. Columbian Ins. Co. 55 Me. 290.

[4] Brigham v. Luddington, 12 Blatchf. 237.

[5] Holmes v. Sherwood, 3 McCrary, 405; s. c. 16 Fed. Rep. 725.

favor or comity, to file his bill for the enforcement of his rights. In the United States, where the common interests of the citizens of the several states are so great, and state inter-dependence is so fully recognized, an exception to the rigor of the general rule, as above stated, has grown to be firmly established.

By virtue of this exception receivers are permitted to pursue their remedies in the courts of other states when necessary, but the permission will not be allowed to interfere with the rights of the citizens of such other states;[1] nor to contravene the policy of such states as to their laws.[2] It is to be noticed that this exception to the general rule is not a matter of right, but is based entirely upon the principle of comity. Whether or not a receiver will be permitted to sue in a foreign court is, therefore, purely discretionary with the court whose aid is invoked.[3] The exception, however, may be regarded as quite as firmly established as the rule itself.

Section 686. **Application of the Exception.**—As illustrating the action of the courts in applying the principle of this exception we note the following cases: An Ohio court permitted a receiver who had been appointed in proceedings to foreclose a railroad in Kentucky, to assert in that forum, his right to property belonging to the railroad and covered by the mortgage, which had been found in Ohio and there attached by a citizen of Kentucky, there being no evidence or claim that the rights of any citizen of Ohio would be affected by such an action.[4] In New Jersey a foreign receiver, duly authorized to take property wherever situate, will be allowed to maintain a suit for its possession in the courts of that state, unless such suit will injuriously affect its own citizens or is contrary to the policy of its laws.[5] In New York receivers appointed in other

[1] Hunt v. Columbian Ins. Co. 55 Me. 290. To same effect are Chandler v. Siddle, 3 Dill. 477, where it was said: "But this power, when it exists, arises from comity in the absence of special statute regulations, and it is in general subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought." Bank v. McLeod, 38 Ohio St. 174; Runk v. St. John, 29 Barb. 585; Pugh v. Hurtt, 52 How. Pr. 22. See also Metzner v. Bauer, 98 Ind. 425; McAlpin v. Jones, 10 La. Ann. 552; Bidlach v. Mason, 26 N. J. Eq. 230; Taylor v. Columbian Ins. Co. 14 Allen, 353; Hoyt v. Thompson, 5 N. Y. 320, reversing s. c. 3 Sandf. Super. Ct. 416; Bagby v. Atlantic, Mississippi & Ohio R. R. Co. 86 Pa. St. 291.

[2] Hurd v. Elizabeth, 41 N. J. Law, 1, 4; Bank v. McLeod, 38 Ohio St. 174. As to the power of receivers over property in another state, see Day v. Postal Telegraph Co. 6 Cent. Rep. 441.

[3] See generally the cases cited above in this section.

[4] Bank v. McLeod, 38 Ohio St. 174.

[5] Hurd v. Elizabeth, 41 N. J. Law, 1, 4. As to the right of a foreign receiver to defend an action in New Jersey, see National Trust Co. v. Miller, 33 N. J. Eq. 155.

states may sue in their official capacity, but the privilege will not be extended to them in a case where damage will result to its own citizens; and its courts have refused to grant their permission for suits against citizens of that state who had been induced to give credit to a foreign corporation.[1]

In Pennsylvania the courts recognize the right of a receiver appointed in another state, to property in that state when the rights of its own citizens are not involved; and have refused to allow a creditor residing in the state where the receiver was appointed, to secure an undue advantage over other creditors, by proceedings in attachment in Pennsylvania against property claimed by the receiver.[2] In Indiana receivers appointed in other states may, if so authorized, maintain actions in the courts of that state.[3] In Louisiana a foreign receiver has been permitted to file his bill for the recovery of property which had been fraudulently removed into that state from the jurisdiction of the court which appointed him.[4]

Section 687. **Further and Generally of Right of Receiver to Sue in Another State or Jurisdiction — Micellaneous Incidents.** — A receiver is the creature of the court which appoints him, and can exercise no power or right beyond its territorial jurisdiction. "Strictly," said the supreme court of Minnesota, "the statutory power of a foreign assignee or receiver can not *ex proprio vigore* be recognized as having any force or effect here; but, by the comity existing between the states, which is recognized as a part of the common law, effect may be given to titles and powers derived from the laws of another state or country, by the courts of this state, when this can be done without controvening the laws or policy of this state, or interfering with the rights of creditors pursuing their remedies under our laws. * * * This application of the rule is sustained by the later and better decisions and by sound reason."[5]

In New Jersey it was said: "A receiver appointed by a court of another state is recognized in this state as competent, under certain conditions, to prosecute suits in the courts thereof."[6] In the case cited it was held that a foreign receiver would be permitted to sue in New Jersey even though a claim of one of its own citizens would

[1] Runk v. St. John, 29 Barb. 585; Pugh v. Hurtt, 52 How. Pr. 22.

[2] Bagby v. Atlantic, Mississippi & Ohio R. R. Co. 86 Pa. St. 291.

[3] Metzner v. Bauer, 98 Ind. 425.

[4] McAlpin v. Jones, 10 La. Ann. 552; Paradise v. Farmers & Merchants' Bank, 5 La. Ann. 710.

[5] Comstock v. Frederickson, 51 Minn. 350.

[6] Folk v. James, 49 N. J. E. 484.

be injuriously affected thereby, if the receiver's action be prosecuted in behalf of a citizen of the state.

It is the universal rule that a receiver of one state has no right or power to institute and prosecute a suit in another state, but will, upon the principle of comity, be permitted to do so, when such will in no way be to the prejudice or injury of residents of the latter state.[1] The exception to the rule is that a receiver may sue in any jurisdiction to enforce his rights to property duly and legally reduced to possession.

The receiver of the Wabash Railroad Company appointed by the federal court in Missouri sued in California to recover a car attached by creditors of the company, residents of California. The receivers had taken possession of the car in controversy, and under their administration, it had been loaded and sent to California, where it was attached. The court said that the authorities do not sustain the extreme view that a foreign receiver has no capacity to sue, in his official character, in "our courts," but that such question was not in issue because the receivers had an actual and lawful possession of the property at the time of seizure.

"But," said the court, "this mere possession of the property of a foreign debtor can not be held to exempt it from the claims of attaching creditors. A debtor can not, by placing or allowing his property to be placed in the possession of a third party, exempt it from attachment. However lawful the possession of the bailee, the property is still subject to attachment or garnishment at the suit of a creditor of the owner." It was said that the settlement of the

[1] Frederickson v. Nunemacher, 81 Wis. 95; Humphreys v. Hopkins, 81 Cal. 551; Sobernheimer v. Wheeler, 45 N. J. E. 614; Winans v. Gibbs & Starrett Manufacturing Co. 48 Kans. 777; Chandler v. Siddle, 3 Dill. 477; Gray v. Davis, 1 Woods, 420; Iglehart v. Pierce, 36 Ill. 133; Dyer v. Power, 14 N. Y. S. 873; Holbrook v. Ford, 153 Ill. 633; Commercial National Bank v. Matherwell Iron & Steel Co. (Tenn.) 31 S. W. R. 1002; Parker v. Stoughton Mill Co. 64 N. W. R. 751; Swing v. White River Co. 65 N. W. R. 174.

Concerning the privilege of a receiver of one state to sue in another, and a judicial comity, this extreme and eccentric announcement has been made: "This phrase may seem little or much. It is as vague in meaning as it is pleasing in sound. The plaintiff is an officer of an Illinois court — a sort of sheriff, with enlarged powers, armed with an equitable execution; the executive arm of the court in Illinois, which is to be extended in Wisconsin to grasp property here and transfer it to Illinois and there account for it. Does judicial comity require that the Wisconsin courts should lend their active aid to such a proceeding? If so, then why should not the right to levy an execution within this state be extended to an Illinois sheriff by the judicial comity? * * * Judicial comity goes to no such length." Fredericksen v. Nunnemacher, 81 Wis. 95.

controversy must depend upon the effect of the order of the court of Missouri appointing plaintiffs receivers. "To show a right superior to that of creditors" said the court, "they must fall back upon the order appointing them receivers, and must depend upon the comity of this state as to the effect to be allowed that order. The substance of that order has been already stated. (It was to manage, control and operate the railroad, and preserve and protect all its property.) It does not pretend to vest the title of the property of the railroad company in the receivers; it neither directs them to take possession of and use the property for the benefit presumably of creditors of the company who have resorted to that particular forum for the enforcement of their debts."

The court cited the note to the case of Alley v. Caspari,[1] and quoted and approved the following extract from it: "We deduce, from a thorough examination of the cases and text books upon the subject, that the great weight of authority is and should be in keeping with the decision rendered by Mr. Justice Wayne, in Booth v. Clark, 17 Howard, 334, that a foreign receiver has no right to sue in another state; but that, on the ground of comity, the court will, in a just and proper exercise of a sound legal discretion, permit such suits to be maintained for the purpose of thereby doing justice where the good of the largest number would demand it, by recognizing the orders and judgment of the courts of a sister state. But in none of the cases is such right to sue conceded, or the suit permitted to be maintained by a foreign receiver, where the suit sought to be enforced conflicts with the rights of citizens or creditors in the state where the suit is brought."

The court thus concluded its opinion: "We think that the effect of the decisions is correctly stated in this extract from Mr. Freeman's note, and we think that in this case justice to our own citizens requires that we should not extend the principles of comity so far as to award this property to the representatives of creditors residing in other states, and who are seeking to hold it for their own exclusive benefit."[2]

Such was the majority decision of the court, Thornton and McFarland, JJ., dissenting, who conceded that it was a general rule that a receiver can not maintain an action out of the jurisdiction of the court which appointed him, but based their dissent upon the fact that the receivers had the possession and right of possession of the car under the order appointing them; that taking and maintaining possession of the car "vested in them as individuals a

[1] 6 Am. St. Rep. 185.

[2] Humphreys v. Hopkins, 81 Cal. 551.

special property, on which title they can as individuals maintain this action."[1] "The statements made in the note referred to in the prevailing opinion" says the dissenting opinion, "related merely to a suit by a receiver in a foreign jurisdiction, where he had never reduced the property to possession, and relied solely on the order of appointment to recover, as a careful perusal of the note will make evident. There is no case cited in the note which holds that a receiver, after he has reduced the property of the litigant to possession and it is taken from him, can not sue for it in any jurisdiction where he can find it. The title vests in the appointed receiver when he has reduced the property to possession and on this title he can recover. * * * Considerations of comity only arise where the receiver sues in a foreign jurisdiction on the mere order of appointment. * * * The special property vested in the receiver gives him a title on which he can recover anywhere."

The majority opinion should have been concluded with the statement therein contained that the question of judicial or interstate comity was not in issue because the receivers had the actual and lawful possession of the car at the time of its seizure. The principles concerning the general right and power of a receiver of one jurisdiction to sue in another are clearly and correctly stated, and the general rule is announced; but because the receivers had reduced the property in controversy to their possession they had the right and power to follow and claim it in any jurisdiction. This is the exception to the rule. Any other doctrine would be ruinous to the operation of a railway company by receivers, as well as to the proper administration of every receivership. We unhesitatingly approve the minority and dissenting opinion, which is amply supported by reason and the authorities.[2]

The general rule concerning the right of a receiver of one state to sue in another has been clearly put by the supreme court of Alabama thus: "Unquestionably the great weight of authority maintains the doctrine, that the powers of a receiver are co-extensive only with the jurisdiction of the court from which he obtains his

[1] Citing in support of their conclusion the following cases: Chicago, etc., Railroad Company v. Keokuk Northern Line Packet Company, 10 Ill. 317; Pond v. Cook, 45 Conn. 146; McAlpin v. Jones, 10 La. Ann. 562; Hurd v. City of Elizabeth, 4 N. J. L. 1; Low v. Burrows, 12 Cal. 188; Lewis v. Adams, 70 Cal. 403; Wilkinson v. Culver, 25 Fed. R. 639.

[2] See in support of text the sections concerning the power of receiver, their title and rights generally; also Commercial National Bank v. Matherwell Iron & Steel Co. (Tenn.) 31 S. W. R. 1002; Cagill v. Woolridge, 8 Baxt. 580; Chicago, Milwaukee & St. Paul Railroad Co. v. Packet Co. 108 Ill. 317.

appointment, and he cannot, as a matter of right, institute suits in the courts of any state, for the recovery of choses in action or property of the corporation or individual whose estate is subject to his receivership. * * * But, while the courts have with great unanimity denied the capacity of a receiver to bring suits in foreign jurisdictions as a question of right, the rigor of the rule has been much relaxed, and the privilege or permission to sue is ordinarily accorded as a matter of comity — not as obligatory, but a favor or curtesy which may be extended or withheld. In the absence of statutory regulations the appointment and title of a receiver may be recognized and he may sue in the courts of another state, unless such suit works injustice or detriment to the citizens thereof or contravenes the policy of its laws." [1]

The Texas civil court of appeals has held that the rule does not extend to a receiver appointed in a foreign country,[2] but assigns no satisfactory reason for such restriction. That a receiver of another country should be granted the privilege of suing in the United States is demanded by the plainest principles of the laws of nations.

It has been held that in an action by a receiver of a foreign corporation appointed in another state the bill must allege that the officers of the corporation, either negligently or willfully, or in obedience to the order of a court having jurisdiction of their persons, fail or refuse to take the necessary measures to save the assets in the receiver's state from waste or spoliation.[3]

A bill in equity was filed in the United States circuit court in Rhode Island by a receiver appointed by a state court in Indiana, of the "Supreme Sitting of the Order of the Iron Hall," asking that the trustees of the branches of that society situated in the former state be required to pay to him the money held by them as a reserve fund, the same to be disposed of by him as instructed by the court appointing him; held, that where a court having proper jurisdiction has assumed the control and administration of a trust like this, and where it appears that the funds to which the litigation relates are properly part of the fund so to be administered, and will be properly administered, in such case it is proper to order the funds paid to the foreign receiver.[4]

The rule requiring a receiver to obtain leave of court before instituting suit applies to suits commenced in another state.[5]

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[1] Boulware v. Davis, 90 Ala. 207.

[2] Moreau v. Du Bellet, 27 S. W. R. 503.

[3] Rogers v. Haines, 11 So. R. (Ala.) 651; s. c. 15 Id. 606.

[4] Failey v. Talee, 55 Fed. Rep. 892.

[5] Pendleton v. Russell, 144 U. S. 640.

Section 688. **In Proceedings in Bankruptcy.**—Under the bankruptcy laws of the United States which were general in their application, intended to serve all creditors alike, and to give to all creditors, whether residing within the district where the bankruptcy proceedings are pending or not, all the right to prove their debts which is possessed by citizens of the district, it has been held that a receiver of the property of a corporation, appointed in another jurisdiction, having full power to represent the corporation of whose property he is in charge by the laws of the state in which he was appointed, may prove debts in bankruptcy due to the estate represented by him, in proceedings in bankruptcy pending in a federal court in another state, and with the same effect as if he had been clothed with his authority as receiver by a court territorially within the district of the federal court having control of the bankruptcy proceedings.[1]

Section 689. **The Receiver may Sue in Foreign Courts in Another Capacity.**—The tendency of the courts to facilitate suits of this character is further shown by the readiness with which foreign receivers secure permission to bring actions when they can claim the privilege on any ground other than a mere appeal to the principle of comity. Accordingly, it has been held that a receiver appointed by a state court for a corporation organized under the state laws, may sue in the federal courts in other states upon a judgment obtained in a court of the state where he was appointed. In such a case he is looked upon as suing as a judgment creditor rather than as a receiver, and if, in the declaration, he style himself "receiver," etc., these words will be considered merely as *descriptio personæ*.[2] And where a receiver was appointed upon a creditor's bill in New York, and the debtor made a general assignment of all his property, in a form sufficient to transfer to him an interest in lands under the laws of Michigan, the courts of the latter state allowed him to file a bill to foreclose a mortgage interest, and to enforce a right of redemption, holding that he did not appear merely as a receiver, but as an assignee holding a legal interest in the property, and that his designation as a receiver was merely descriptive.[3]

Upon the same principle if a receiver duly appointed and in actual possession of property, sends it into another state by order

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[1] *Ex parte* Norwood, 3 Biss. 504.

[2] Wilkinson v. Culver, 23 Blatchf. 416; s. c. 25 Fed. Rep. 689.

[3] Graydon v. Church, 7 Mich. 36.

of the court appointing him, and it is there attached, the receiver will be permitted to maintain an action there in replevin for its recovery.[1] But the courts of one state are not bound to recognize the transfer of property situated within their own state to the detriment of its citizens, made by virtue of proceedings in the courts of another state. Thus, in a case in Texas, the court declined to recognize the title of a receiver appointed in Tennessee for a corporation to whom lands situated in Texas had been conveyed under his receivership, as against creditors in Texas who had levied attachments upon it, holding that the rights of the citizens of Texas could not be jeopardized by the proceedings in Tennessee.[2]

Section 690. **The Jurisdiction as Affected by the Acts of Others.**—It sometimes happens that a person against whom a receiver seeks his remedy in a foreign state, has, by his previous acts, or dealings with the receiver, furnished a ground for a suit against him in a foreign jurisdiction which would not otherwise have existed; as e. g. where a citizen of one state has dealt with a receiver appointed in another state, and has become indebted to him. In such a case it would be unjust to refuse to the receiver the right to bring his suit where he can get jurisdiction of the person of his debtor — that is to deny to him the only right of redress he may be able to invoke. Accordingly, it has been held in Illinois that the successors of a receiver appointed in a foreign state could proceed in the courts of Illinois to foreclose a mortgage given to the original receiver, by a proceeding in their own names as receivers, this designation being considered *descriptio personæ*;[3] and this, as has already appeared, is the general rule in point.

If receivers have the power, by the laws of the state in which they are appointed to sell, assign, and convey the assets of an insolvent, a debt due to the insolvent from a citizen of another state may be assigned by them for the purpose of giving to the purchaser an equitable right of action against the debtor in the foreign state.[4]

Section 691. **The Jurisdiction of the Appointing Court will not be Presumed.**—In a case where a receiver, who was duly appointed

[1] Cagill v. Wooldridge, 8 Baxt. 580. In this case it was also held that third persons, who were not parties to the original suit, could not have the benefit of any irregularity in the appointment of the receiver. See also Chicago, Milwaukee & St. Paul R. R. Co. v. Packet Co. 108 Ill. 317.

[2] Moseby v. Burrow, 52 Tex. 396.

[3] Iglehart v. Bierce, 36 Ill. 133,

[4] Hoyt v. Thompson, 5 N. Y. 320. In this case the effect of the assignment as against creditors and *bona fide* purchasers was not determined.

by a court in another state, brought a suit in Kansas to which the defendant answered denying the jurisdiction of the court which appointed him, but failed to show the powers of that court by competent proof from the laws of the foreign state, or in any other way, and the record did not show whether the court whose jurisdiction was denied was of special or general jurisdiction, it was decided by the supreme court of Kansas that the power of the foreign court to appoint a receiver could not be presumed.[1]

C.

In What Name He May Sue.

Section 692. **The Rule Against Suing in His Own Name.**— Whether a receiver may institute and conduct suits upon causes of action, which accrued to his principal prior to his appointment, in his own name or in the name of the party to whom the cause of action first accrued, is primarily controlled by statutes, if any there be, affecting the question, or by the order of the court. But where the matter has not been settled by statute, or by an order of court, there will be found a diversity of opinion in the reported decisions as to which course is proper.

The prevailing opinion seems to have been that if he be not expressly authorized to sue in his own name either by statute or order of court, he must sue in the name of the party in whom the right of action was vested before his appointment.[2] This rule is predi-

[1] Kronberg v. Elder, 18 Kan. 150.

[2] Manlove v. Burger, 38 Ind. 211; Yaeger v. Wallace, 44 Pa. St. 294, an action of trover by a receiver of a partnership to recover for the conversion of firm property before his appointment, it being held that the suit should have been in the name of the firm, upon the ground that the appointment did not transfer to the receiver the rights of the firm in choses in action. But on this point see Gillet v. Fairchild, 4 Denio, 80; King v. Cutts, 24 Wis. 627, holding that a receiver cannot maintain an action of forcible entry and detainer in his own name, but should obtain leave to sue in the name of the lessor; Booth v. Clark, 17 How. 331; Graydon v. Church, 7 Mich. 36; Dick v. Struthers, 25 Fed. Rep. 103, holding that, as in Pennslyvania, a receiver of a corporation is merely a custodian of property, and is not invested with its title to letters patent, he can not sue upon them in his own name; Freeman v. Winchester, 18 Miss. 577; Battle v. Davis, 66 N. C. 252, where the rule was applied notwithstanding the order of appointment authorized the receiver to collect such choses in action as might come to his hands, and to prosecute them in the courts of the state; Ingersoll v. Cooper, 5 Blatchf. 426, to the effect that notes not made or assigned to the receiver should be sued upon in the name of the owner of the legal title; Newell v Fisher, 24 Miss. 392, in which it was held that an amendment changing the character of the plaintiff from that of an administrator to that of a receiver,

cated upon the theory that the receiver does not become invested with the legal title to choses in action by virtue of his appointment, and is not a purchaser for value. This theory, as we shall hereafter see, has always been controverted, and now appears to be losing ground as being unsatisfactory and unnecessarily technical; but in the development of it the courts have held uniformly that, while the legal title to choses in action was not in the receiver it was in the court which appointed him to such an extent that it could, as it often did, and continues to do, authorize him to use his own name in suing upon them.[1]

The courts have also directed their receivers to discontinue actions brought by them in the names of third persons without authority, and have enforced their orders by injunction.[2] So, also, the receiver is often required, when the legal title is in third persons, to obtain an order of court to prosecute in the name of such third persons, after due notice of the application.[3]

Section 693. **The Contrary and Preferable Rule.**—As intimated above, the rule requiring receivers, not authorized by statute or order of court, to bring suit in the name of such parties as had the legal title prior to the appointment, has not been universally approved even by the courts which adhere to it,[4] and has been directly opposed in a line of decisions, which hold, in effect, that the receiver, by virtue of his appointment and of his character as representative of all parties interested in the property, is a *quasi* assignee, and is invested with the title to all rights of action possessed by his principal at the time of the appointment, to such an extent, at least, as will enable him to sue upon them in his official character.[5] This

was an abandonment of the capacity in which he originally sued and virtually destroyed the action; Justice v. Kirlin, 17 Ind. 588; Garver v. Kent, 70 Ind. 428; Moriarty v. Kent, 71 Ind. 601; Harrell v. Kent, 71 Ind. 602; State v. Wilmer, 65 Md. 178 (1886); s. c 3 Atl. Rep. 252, to the effect that a receiver appointed in the place of executors should sue the sureties upon their bond in the name of the State. See also Green v. Winter, 1 Johns. Ch. 60; St. Louis, etc., Co. v. Sandoval, etc., Co. 111 Ill. 32. The liability of sureties on an official bond is not a "debt" which, under the attachment law of Missouri, a receiver is authorized to sue for in his own name. State v. Gambs, 68 Mo. 289, 296.

[1] Hardwick v. Hook, 8 Ga. 354; Leonard v. Storrs, 31 Ala. 488. The practice of authorizing receivers to sue in their own names by the terms of the order by which they are appointed is common.

[2] Merritt v. Lyon, 16 Wend. 405; *Re* Merritt, 5 Paige, 125.

[3] Merritt v. Lyon, 16 Wend. 405.

[4] It was seriously questioned in Freeman v. Winchester, 18 Miss. 577.

[5] Wray v. Jamison, 10 Humph. 186, where it was held that the right of action was diverted from the original parties of whose estate the receiver had

position seems to be entirely reasonable and to be in accord with other well recognized rules concerning the powers and duties of the receiver, as e. g. that he may make sale of the property and give a valid title — whereas the insolvent can not do so after a receiver of his effects is appointed — and that he may sue for the purchase money of property sold by him, in his own name. The supreme court of New Jersey has recently rendered an important decision upon this point, holding that a receiver is by legal intendment an assignee, and that express authority to him to sue for assets, or upon choses in action constituting a part of the assets, is not essential.[1]

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charge, and invested in him of necessity, so that he alone could sue upon it and in his own name; Helme v. Littlejohn, 12 La. Ann. 298, in which it was decided that the receiver of a partnership is authorized merely by virtue of his appointment to institute actions in his own name for the recovery of money due to the firm, and that his judgment in such an action will fully protect the defendant therein; Singerly v. Fox, 75 Pa. St. 112, to the effect that a receiver by virtue of his appointment may sue in his own name for the purchase price of property sold by him; Hardwick v. Hook, 8 Ga. 354, holding that a receiver authorized by the order of his appointment to bring suits concerning the subject matter of his trust, may do so in his own name; Iglehart v. Bierce, 36 Ill. 133, wherein the court adjudged that a bank, whose assets were in the hands of a receiver, was not a necessary party to an action by them to foreclose a mortgage to recover money due the estate, upon the ground that as its property had been given over to the receivers it had, *prima facie*, no such interest in the property as required it to be made a party, and that its only right was to compel the receivers to account.

[1] Wilkinson v. Rutherford (Sup. Ct. N. J. Feb. 1887), 10 East. Rep. 134; s. c. 6 Cent. Rep. 521; s. c. 8 Atl. Rep. 507; s. c. 1 Ry. & Corp. L. J. 421, wherein Mr. Chief Justice Beasley, pronouncing the opinion of the court, said: "The bond in this case is payable to the corporation represented by the plaintiff as receiver; and the contention is that, as the statute, by virtue of which the receivership has been created, is silent as to the powers annexed to such office, a right to sue in his own name has not been imparted to him. This proposition has undoubtedly considerable authority in its favor; so much, indeed, that a recent text-writer has declared it to be the doctrine that has, in general, found favor in the courts. High, Rec. section 209. The rule thus affirmed is that the receiver must sue in the name of the persons having the legal right. When neither the statute law nor the order of his appointment authorized him to proceed in his own name, he must proceed in the name of the person in whom the right of action existed before his appointment. * * * It has been already shown that there is no statutory definition of the powers of the receiver. The question, consequently, that arises, is as to the inherent abilities of a receiver by force of the usual rules of jurisdiction. I cannot agree to the doctrine that a receiver is a mere custodian of the property of the person whom in certain respects he is made to supplant, and it would seem that he is an assignee of the assets within the scope of his office. There seems to be no reason why his power should not be held to be co-extensive with his functions; and it is clear that he cannot conveniently perform those functions unless upon the

Section 694. **Of Suits to be Brought in His Own Name.** — In that class of cases where the right of the plaintiff to bring suit is based upon his possession — as in actions of trover and conversion — a receiver who has come into possession of property by virtue of his appointment, may bring such suit in his own name.[1] This principle has been extended to a case where an execution on a judgment in favor of an insolvent bank had been levied on real estate and seizin thereof delivered to the receivers, it being held that the receivers could maintain an action of forcible entry and detainer in their own names against the tenant holding possession without consent.[2] And, upon the principle that the receiver represents the

theory that some interest in the property, akin to that of an assignee's, passes to him. The receiver is to discharge the executory duty of collecting the debts, and taking into his possession, even against antagonistic claims, the tangible property; and, after his appointment, a sale of such property by the insolvent would, it is presumed, be absolutely void; and yet, if the interest in the property thus transferred was not vested in the receiver, it would be difficult to find ground on which to invalidate the transaction. If no title resides in the receiver in disposing of property, he would be obliged to make sale in the name of the insolvent owner, and, if the money that became due was not paid, to collect it by suit in the name of such owner, and yet, in the case of Singerly v. Fox, 75 Pa. St. 112, it was decided that such officer could sue in his own name for the purchase money of an article sold by him in his official capacity. The inconvenience of requiring these agents of a court of equity to institute all actions in the name of the insolvent was exemplified in a case arising in the state of Maine; the question being whether the receivers of a bank could maintain in their own names an action to obtain possession of real estate to which the bank was entitled; the right to prosecute in the form adopted was upheld by the supreme court of that state, the circumstance being emphasized that the writ under a judgment, if obtained in the name of the bank, would require the officer executing it to put the bank, and not the receivers, in possession, which was not the object of the suit. Baker v. Cooper, 57 Me. 388. These embarrassments, as well as many others of a like kind, are obviated by the adoption of the doctrine, that *virtute officii* a receiver becomes a provisional assignee of the property committed to him, and this doctrine is recognized in the case of Harrison v. Maxwell, 44 N. J. Law, 319. It will be observed that the theory thus approved, attributes to a receiver of the kind in question, only a limited power to institute action in his own name, as he is supposed to have the power, in this respect, of an assignee, and nothing more. A chose in action that is not so transferable as to enable an assignee to sue for it in his own name is transmitted to a receiver subject to the same qualification." Of this decision the accomplished editor of the New York Daily Register said, that it "seems to be a not improper judicial adoption of the principle embodied by the statute in England by Lord Brougham's Vesting Order." N. Y. Daily Reg. April 21, 1887.

[1] Singerly v. Fox, 75 Pa. St. 112; Gardner v. Smith, 29 Barb. 68; Boyle v. Townes, 9 Leigh. (Va.) 158.

[2] Baker v. Cooper, 57 Me. 388. Walton, J., said: "The object of the suit is to obtain possession of the real estate in question for the receivers, and not for the bank. A suit in the name of the

creditors as against the officers of a corporation, a bill to obtain satisfaction of a debt against an original debtor, which debt has been fraudulently discharged by collusion with the officers of the corporation, may be filed in the name of the receiver.[1]

In the same way a suit to set aside and vacate a judgment recovered against a corporation without consideration and by collusion with its officers, in fraud of the creditors, was properly brought by the receiver of the corporation in his own name.[2] It has been held that a receiver appointed in one jurisdiction to take charge of a fund can not sue in another in his own name, although expressly authorized by the decree to maintain actions in his own name.[3] A receiver authorized by an order of a federal court to prosecute suits in the courts of the state wherein the federal court is situated, can not bring suits in the state courts in his own name if such state courts have not themselves the power to allow him to sue in the same manner.[4]

There is a manifest distinction between permitting a receiver to collect a judgment already rendered, and conferring on him the right to institute an action in which he has no interest, for the purpose of recovering a judgment for the benefit of others. The parties in interest must sue.[5] The successors of a receiver who might sue in his own name may institute the suit in their own names.[6]

Section 695. **Where the Right is Given by Statute.** — In some of the states statutes have been enacted which, either directly or by necessary implication, determine in what name a receiver shall proceed in prosecuting suits on behalf of the estate he represents.[7] Generally if the statute provides that such suits may be

bank would not accomplish that purpose; for the execution or writ of possession, if one was obtained, would require the officer executing it to put the bank, and not the receivers into possession." But see American Bank v. Cooper, 54 Me. 438.

[1] Nathan v. Whitlock, 9 Paige, 152. But this right was questioned in Hyde v. Lynde, 4 N. Y. 387.

[2] Whittlesey v. Delaney, 73 N. Y. 571, 578.

[3] Hazard v. Durant, 19 Fed. Rep. 471.

[4] Battle v. Davis, 66 N. C. 252, 257.

[5] Murrell v. McAllister, 79 Ky. 311, 313.

[6] Iglehart v. Bierce, 86 Ill. 133.

[7] Under § 668, Code of North Carolina, a receiver of a corporation may sue a debtor of such corporation either in his own name or that of the corporation. Gray v. Lewis, 94 N. C. 392. As to the effect of the statute of Missouri, see State v. Fichteukamm, 68 Mo. 289. Under the Connecticut statute a receiver of a corporation may recover for the conversion of its property by a suit in his own name. Terry v. Bamberger, 44 Conn. 558; and a foreign receiver may, in his own name, bring suit in that state to recover upon contracts originally made with the corporation represented by him. Cooke v. Town of Orange, 48 Conn. 401.

brought in the name of the party over whose estate the receiver is placed, "or otherwise," the receiver may properly institute the suits in his own name.[1] If the statute give receivers of corporations full power to sue for and collect demands, or to recover property in the name of the corporation for the use of its creditors, in the same way and to the same extent that the corporation itself might recover, the effect is to vest in the receiver the right of action and to prevent the corporation from prosecuting in its own name.[2]

The term, "chose in action," as used in a statute authorizing a receiver of a corparation to sue in his own name, has been construed to extend to all rights, whether arising in contract or in tort, to property not in possession, so as to authorize an action of trover for bonds belonging to an insolvent bank by its receiver in his own name, although the conversion occurred before his appointment.[3] When a statute authorizes a court to make such orders and decrees as may be necessary for winding up the affairs of a corporation, the court may empower its receiver to bring suits in his own name for unpaid subscriptions to the capital stock of the corporation,[4] or for funds misapplied or wasted by its officers.[5]

Section 696. **Further and Generally as to Name in Which Receiver May Sue — Review of Recent Decisions.**— There has been too much regard for form and technicality in the matter of determining in whose name receivers should sue to enforce the rights of the trust estate. There is no satisfactory reason why a receiver should not, in every instance and under all conditions, be permitted to sue in his own name, as receiver. In his representative capacity he is, indeed, the real party in interest; and as he conducts and controls the suit it is more reasonable and consistent that it should be in his name. Any other doctrine borders on the eccentric and absurd.

There is, however, an irreconcilable conflict between the adjudications upon the subject, but we advocate the doctrine announced in the cases declaring it the proper course and practice for receivers to sue in their own names as such,[6] and must disfavor those holding that such suits should be in the names of the parties whose property the receivers possess.

The authorities agree generally that the rule that receivers must

[1] Manlove v. Burger, 38 Ind. 211; Hayes v. Brotzman, 46 Md. 519; Frank v. Morrison, 58 Md. 423.

[2] Miami Exporting Co. v. Gano, 18 Ohio, 269; Renick v. Bank of West Union, 18 Id. 298.

[3] Gillet v. Fairchild, 4 Denio, 80.

[4] Gill v. Balis, 72 Mo. 424.

[5] Alexander v. Relfe, 74 Mo. 495.

[6] Frankle v. Jackson, 80 Fed. R. 398.

sue in the names of those whose property they hold is confined mostly to temporary receivers, who take no title,[1] while permanent receivers, who become invested with the title to the property, may sue in their own names. A receiver *pendente lite* is the mere custodian of the property committed to him. "If such a receiver," it has been said, "finds it necessary to bring suit to reduce choses in action to his possession, or to recover the property intrusted to his custody, he must sue in the name of the corporation having the title, upon leave obtained for that purpose."[2]

The opinion of the supreme court of Minnesota in the case of Henning v. Raymond,[3] prepared by that very able jurist, Judge Mitchell, is of such interest upon the subject under consideration that we quote from it as follows: "The rule generally laid down in the books is that, where a receiver is appointed under the equity powers of a court, he can not sue in his own name, but the action must be brought in the name of the legal owner of the property, who will be compelled to allow the use of his name for that purpose. This rule seems to be predicated upon the idea that a common law receiver is the mere custodian of the property, and can not be considered as an assignee of it, and does not become the owner. Such, at least, seems to have been the doctrine of the common law courts; and courts of chancery, when called upon to authorize their receivers to proceed in an action at law, were necessarily compelled to conform to the rules of the common law courts. It is true that a common law receiver, such as the plaintiff, is not the assignee of the owner, but officially at least of the property intrusted to him; but it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. When a court has taken property into its own charge and custody for the purpose of administration and disposition, in accordance with the rights of the parties to the litigation, it is *in custodia legis*. The title of the property for the time being, and for the purposes of such administration, may, in a sense, be said to be in the court. The proceeding by receivership is *quasi in rem*, so far as it involves a sequestration of assets. The receiver is appointed for the benefit of all concerned. He is the representative of the court and of all the parties interested in the litigation wherein he was appointed. He is the right arm of the court in exercising the jurisdiction invoked in such case of administering the property. The court can only administer and

[1] Harlan v. Bankers & Merchants' Telephone Co. 32 Fed. R. 365.

[2] Harlan v. Bankers & Merchants' Telephone Co. 32 Fed. R. 305.

[3] 35 Minn. 303.

dispose of it through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver and the proceeds received and distributed by him alone. If the suit be prosecuted in the name of the original owners of the property, it is an inconvenient, as well as useless form; they have no discretion as to instituting the suit, and no control of its management, and no right to the possession of the proceeds. The receiver, as the officer of the court which has taken control of the property is, for the time being, and for the purpose of the administration of the assets, the real party in interest in the litigation. There is no reason, therefore, why the suit should not be instituted in his own name. * * * In many jurisdictions, in the absence of any such statute, it has been held that courts may, by virtue of their inherent equity power, authorize receivers to institute suits in their own names. * * * Whatever technical reasons may have existed for refusing to permit common law receivers to sue in their own names, they exist no longer under our code. As an officer of the court intrusted with the administration of the partnership assets we do not see why the plaintiff has not such a special property in them as to constitute him the real party in interest, within the meaning of the statute. But in as much as in his official capacity, he acts as 'the trustee of an express trust,' he has in any event, a right to maintain this action on that ground."

This opinion is founded on the plainest principle of reason and common sense, and to the views therein expressed we willingly subscribe.[1]

In Maine it has been held that a receiver of a savings bank may sue in either his own name or that of the corporation.[2]

Concerning the subject of this section this has been said: "The actions which may be brought by receivers in their own names for the protection of property which has come into their custody, or those which may be maintained upon an equitable right, are not to be confounded with those which must be brought by them in the name of another although the equitable right may be in those whom the receiver represents, and not in the party having the legal estate. When the receiver goes into a court of law he must stand, if at all, on the legal estate. If he applies for leave to use the name of the person having the legal right of action, the court will indemnify the latter, by compelling security against the hazard of costs."[3]

In many of the cases it has been considered vital whether the court

[1] Supported by Person v. Warren, 14 Barb. 488; Thomas v. Bennet, 56 Id. 197.

[2] Hobart v. Bennett, 77 Me. 401.

[3] Lansing v. Manton, 14 Nat. Bank Reg. 127.

appointing the receiver authorized him to sue in his own name, and it seems that the order of court in this regard will control.[1] It is also made a consideration whether the suit be to reduce property never held by the receiver to his possession, to enforce his right to such property, or whether it be based on an obligation contracted by and due the receiver as such. While in the former case it is held the suit can not be prosecuted in the name of the receiver, yet the contrary is announced under the latter conditions.[2] In the last case cited it was said: "Neither the reason nor the rule controls any case a receiver brings upon a contract made with him, or upon an obligation due to him as such." This is a distinction and exception to be suggested and urged in those jurisdictions where the courts have followed the rigid rule denying to the receiver the right to sue in his own name under any conditions.

The decision of the supreme court of Missouri in the case of Thompson v. Greeley,[3] is to be noted as a recent authority favoring the rule permitting a receiver to sue in his own name, even to enforce a right due to the debtor whose property he possesses. It was held in the case cited that a receiver of an insolvent corporation, whose appointment was the exercise of the inherent power of a court of equity, and in whom the title to assets of the corporation was invested by the court, could maintain an action in his own name to enforce a liability of directors.

In Massachusetts it has been declared that, unless authorized by a statute, a receiver of a corporation can not bring suit in his own name to recover property of the corporation never in his possession, unless by statute or by a decree of a competent court, or unless the title of the property has been conveyed to him, yet if there is any other objection to the bill it may be amended by substituting the name of the corporation for that of the receiver.[4]

A recent decision by the Kentucky court of appeals is emphatic in favoring the rule permitting a receiver to sue, in his own name, it being declared that he is "the real party in interest" within the meaning of the code provision.[5]

If the receiver is authorized by order or decree of the court to institute and prosecute suits he has, it has been declared in Maryland, the right to sue in his own name.[6] But it has been held in

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[1] Kehr v. Hall, 117 Ind. 504; Pouder v. Catterson, 127 Ind. 484.

[2] Pouder v. Catterson, 127 Ind. 484; Kehr v. Hall, 117 Ind. 405.

[3] 107 Mo. 577.

[4] Wilson v. Welch, 151 Mass. 77.

[5] Caldwell v. McWhorten, 84 Ky. 130.

[6] Frank v. Morrison, 58 Md. 423. Same effect, Comer v. Brag, 8 So. R. 554.

Connecticut that if the corporation be not dissolved, the receiver must sue in its name.[1] In North Carolina it has been declared that a receiver having power to collect the assets of the estate, can maintain an action in his own name on a policy of insurance issued to the debtor whose property he possesses.[2]

Section 697. **Substitution of the Receiver as Plaintiff.**—In case suit has been begun by a corporation and is pending at the time a receiver is appointed, the proper course is to have the receiver substituted as plaintiff in place of the corporation. In such a case the court will not permit the cause to proceed until the substitution is made, and will make no order affecting his right to be substituted without notice to him.[3] In granting a receiver's motion for substitution the court may impose suitable conditions if necessary to protect the rights of other parties.[4]

The appointment of a receiver of the property of a plaintiff in a pending action is not good ground for a continuance.[5] In the same way if a receiver who has instituted a suit in his own name, be removed, his successor may be substituted as plaintiff in his stead,[6] and the death of the first receiver after the substitution of his successor will have no effect upon the action by way of abatement.[7] So, also, if a receiver die after instituting an action on behalf of the estate in his custody, the action does not abate, if the cause of action survive, but may be continued, and his successor in the office may be substituted.[8]

D.

The Receiver's Pleadings and Proofs.

Section 698. **His Authority to Sue Should be Alleged — How Objection to Petition Taken.**—Since a receiver sues in a repre-

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[1] Wilcox v. Continental Life Insurance Co. 56 Conn. 468.

[2] Boyd v. Royal Insurance Co. 111 N. C. 372.

[3] Talmage v. Pell, 9 Paige, 410.

[4] Livingston v. Olyphant, 2 Robert. (N. Y.), 639, where he was required to assume the burden of proof as to the consideration of a note; National Trust Co. v. Murphy, 30 N. J. Eq. 408, in which the substitution of a foreign receiver was made upon such terms as would protect the citizens of the state where the suit was pending, being creditors of the foreign corporation, and such as would secure obedience to orders of the court respecting such funds as might be realized.

[5] Toledo, Wabash & Western R. R. Co. v. Beggs, 85 Ill. 80.

[6] Sheldon v. Adams, 27 How. Pr. 179; s. c. 41 Barb. 54.

[7] Id.

[8] Searcy v. Stubbs, 12 Ga. 437. In Georgia the proper practice for the substitution of a second receiver as plain-

sentative capacity and not in his personal right, it is considered necessary that he should not only set out in his pleading the right of the party whom he represents, but also the authority under which he assumes to act; and generally it is essential that he do this by showing, in a way capable of being traversed, his appointment by a court of competent jurisdiction, in a case within its jurisdiction, and that he has its authority to prosecute the action.[1] Sufficient facts concerning the appointment should be alleged to show that it has actually been made, and the facts so alleged should be set out in such form that issue may be joined thereon.[2]

In New York, the courts recognizing the disadvantage, inconvenience and expense incurred by requiring a receiver to plead all the facts concerning his appointment, and relaxing their former stringent requirements, have held that an averment of the appointment, in general terms, is sufficient, and that under such an averment the receiver may prove all the facts necessary to confer jurisdiction.[3] So allegations of appointment by a certain court at a certain place and time, and that the security required had been filed, and that the receiver was in lawful possession of the property were, upon demurrer, held to be sufficient.[4] A mere allegation that he was duly appointed on a certain day is not sufficient, because it can not be put in issue or tried.[5]

The mere allegation in the petition that the plaintiff is a duly appointed receiver, without any averment as to whom or by what court he was appointed, is so defective that objection to the petition may be made on motion in arrest of judgment.[6] The objection that the petition fails to show the due appointment of the plaintiff

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tiff was said to be by *scire facias* to the defendant in the action. Palmer v. Murray, 18 How. Pr. 545, where the New York practice was stated to be by proceedings in the nature of a bill of revivor or a supplemental bill.

[1] Coope v. Bowles, 42 Barb. 87; s. c. 28 How. Pr. 10; s. c. 18 Abb. Pr. 442; Bangs v. McIntosh, 23 Barb. 591; Stewart v. Beebe, 28 Barb. 34; White v. Low, 7 Barb. 204; Potter v. Merchants' Bank, 28 N. Y. 641. See also, as to the means of questioning the sufficiency of the allegations under the New York code, Cheney v. Fisk, 22 How. Pr. 236.

[2] White v. Low, 7 Barb. 204.

[3] Rockwell v. Merwin, 45 N. Y. 166, affirming s. c. 8 Abb. Pr. (N. S.) 330; White v. Joy, 13 N. Y. 83; Manley v. Rassiga, 13 Hun, 288.

[4] Stewart v. Beebe; 28 Barb. 34. See also Donnelly v. West, 17 Hun, 564, 568. Under the former practice it was held that the receiver must state in his complaint the time and mode of his appointment, a mere description of himself as "having been duly appointed," and "bringing this suit by order of the supreme court" being insufficient as not being issuable. Dayton v. Connah, 18 How. Pr. 326. He was also required to state the place where the appointment was made. White v. Low, 7 Barb. 204.

[5] Gillet v. Fairchild, 4 Denio, 80.

[6] Griesel v. Schmal, 55 Ind. 475.

as receiver, can not be raised on general demurrer, the specific ground for the demurrer should be want of legal capacity to sue.[1]

The petition must allege that the plaintiff receiver has obtained the consent of the court which appointed him to institute the suit; otherwise it will be demurrable.[2]

Section 699. **This Rule Applies to Receivers of National Banks.**—The rule that the allegation of the receiver's appointment and authority may be made in general terms, has been applied to cases were the receiver was appointed in accordance with the provisions of the national banking law. In a case where it was alleged by the plaintiff that he was duly appointed receiver of a national bank by the comptroller of the currency, on a day named, in accordance with the provisions of the acts of congress and the amendments thereto, by and with the concurrence of the secretary of the treasury, and that, under the authority of these acts, he had taken possession of the effects of the bank, including the note sued upon, these allegations were held to be sufficient upon demurrer, and he was not required to plead or prove that the emergency specified in the law had arisen or had been adjudicated, as is required by the terms of the law in order to justify the appointment.[3]

Section 700. **When the Defendant is Estopped to Deny the Receiver's Authority.**—A defendant in a suit brought against him by a receiver may be estopped, by his own admissions or conduct, from denying the authority of the receiver to institute the action, and in such a case the receiver is not required to prove either his appointment or his authority to bring the suit; as when a defendant in an action, brought by a receiver, filed a demurrer which was overruled with leave for him to plead to the merits, upon his executing a good and sufficient bond conditioned to abide the result of the action, and such a bond was given, it was held, in an action upon the bond after judgment had been obtained in the original action, that the execution of the bond was an admission, on the part of the defendant, that the plaintiff had been duly appointed receiver, and had been authorized to bring the action referred to in the bond, and that such an admission rendered it unnecessary for

[1] Walsh v. Byrnes, 39 Minn. 527.

[2] Pouder v. Catterson, 127 Ind. 434; Wayne Pike Co. v. State ex rel. 134 Ind. 672; Davis v. Talbutt, 27 N. E. R. 494; Swing v. White River Lumber Co. 65 N. W. R. 174; Keen v. Breckenridge, 96 Ind. 69; St. Louis, Alton & Springfield Railroad Co. v. Hamilton, 41 N. E. R. 777; Hatfield v. Cummings (Ind.), 39 N E. R. 859.

[3] Platt v. Crawford, 8 Abb. Pr. (N. S.) 297.

the receiver to prove either his appointment or his authority to sue.[1]

Section 701. **Defect in Pleading the Appointment Cured by Verdict — A Transcript of the Order Need Not Accompany the Pleading.**—The omission of an averment of the time when an appointment of a receiver was made, and of the court by which it was made, will be cured by the verdict.[2] When the receiver of an insolvent insurance company brought an action to enforce the assessment upon the premium notes due to the company, it was held that he was under no necessity to filing with his pleading a transcript of the decree against the insurance company, by which the assessment had been ordered, and under which the receiver was appointed, because, while his right to maintain the action was essential to a recovery, and was to be averred and proved upon the trial, it was not the basis upon which the action was founded.[3]

Section 702. **Allegations Necessary in Actions by a Receiver in Supplementary Proceedings.** — Upon the ground that, in general, a receiver is not clothed with the right to maintain an action which could not be maintained by the party or estate represented by him, a receiver in supplementary proceedings has been required by a court in New York, to state in his complaint the right of the parties represented by him to maintain the particular action, showing a cause of action existing in them, and that by the appointment of the court, lawfully made, in a matter where the court had jurisdiction, the power had been conferred on him, in his representative capacity as a receiver, to prosecute the action. It is not enough to allege generally that he was appointed receiver in supplementary proceedings. The judgment and other facts necessary to maintain supplementary proceedings must be set forth.[4]

Section 703. **Of the Proof of the Appointment.** — It is not necessary when proof of the appointment of a receiver is required, that he should introduce a transcript of all the proceedings in the suit in which he was appointed; such a requirement would tend to deprive the parties of the benefit of his appointment, and would unreasonably increase the expense attending suits brought by him.[5]

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[1] Scott v. Duncombe, 49 Barb. 78.

[2] Griesel v. Schmal, 55 Ind. 475. In this case the action was instituted by the receiver of a partnership to recover a debt due to the firm of whose assets he had charge.

[3] Boland v. Whitman, 33 Ind. 64.

[4] Coope v. Bowles 42 Barb. 87; s. c. 18 Abb. Pr. 442; s. c. 28 How. Pr. 10.

[5] Helme v. Littlejohn, 12 La. Ann. 298. The proof here offered was a certificate by the judge that the appoint-

A certified copy of the order of appointment is considered *prima facie* proof that the proper parties were before the court when the appointment was made, but the defendant is at liberty to rebut this presumption.[1]

It has been further decided, when a receiver upon the trial, in order to prove his appointment, offers in evidence merely a copy of the order of his appointment and proof of the fact that he has filed the bond required by the order, that the recitals in the order are sufficient to prove the pendency of the original action in which it was made, if the appointing court were a court of general jurisdiction, it being presumed that in a court of such a grade every requirement necessary to justify it in making the order had been complied with.[2]

The capacity of one to sue as receiver is sufficiently proved by the order of appointment and his bond.[3] In an action by a receiver of a corporation against a subscriber to recover his subscription to the stock of the company the decree in the equity case, appointing the receiver and defining his powers and duties is admissible to prove the appointment of the receiver and his authority to institute and conduct the suit.[4]

In New York in addition to the order of appointment, proof of the commencement of the action in which the appointment was made, has been required.[5]

There is no presumption that persons were appointed receivers because they have acted as such.[6] The appointment must be alleged and proved.[7]

E.

Defences to Actions by Receivers — Set-off.

Section 704. **The Appointment of a Receiver Does Not Generally Affect Defences of the Debtor.** — A defendant in a suit

ment had been made in the action after a consideration of the evidence, the pleadings and the law, to which it was objected that it did not show that the proper parties were before him, and that the entire record should have been offered. The court, Merrick, C. J., said: "We think that the certified copy of the entry alone making the appointment ought to be deemed *prima facie* proof that the court had the proper parties before it when the appointment was made, leaving the opposite side to rebut the presumption."

[1] Helme v. Littlejohn, 12 La. Ann. 298.

[2] Potter v. Merchants' Bank, 28 N. Y. 641; Hayes v. Brotzman, 46 Md. 519; *Cf.* Frank v. Morrison, 58 Md. 423.

[3] Palmer v. Clark, 4 Abb N. C. 25.

[4] Frank v. Morrison, 58 Md. 423.

[5] Springs v. Bowery National Bank, 63 Hun, 505.

[6] International & Great Northern Railroad Co. v. Moore (Tex. Civ. App.) 33 S. W. R. 372.

[7] Hatfield v. Cummings (Ind.) 39 N. E. R. 859.

brought by a receiver may avail himself of any defence which he has to the claim as against the original party, and may plead it with like effect.[1] This rule follows naturally from the proposition already stated that the appointment of a receiver does not affect the obligation of contracts or other rights of action existing between the party whose property is given over to a receiver, and others.[2] Accordingly, where the receivers of a bank brought suit upon a note given for a subscription to its capital stock, it has been held that the maker may be allowed to make the defence that it was obtained from him by means of false and fraudulent representations by the agents of the bank, as to the value and condition of the stock.[3] So, where a depositor in a bank obtained advances upon the agreement that his balance on deposit and that of his firm should be applied to their payment, it was held in an action by the receiver of the bank upon the note given for such advances, that the defendant was entitled to a deduction to the extent of the balances which had not already been applied in payment of the advances.[4]

Section 705. **Instances of Defences Not Allowed.** — If a receiver loan trust funds without legal authority, and take a promissory note for security, the want of such legal authority is not a good defence in an action on the note, brought by a receiver, subsequently appointed, who holds it as part of the assets of the trust estate.[5] Even if a transfer of a debtor's property to receivers, made by an order of court upon the application of a judgment creditor, be voidable by other creditors under the state insolvent law, that debtor's debtor can not set up the objection in a suit by the receivers.[6] When receivers of the property of an insolvent corporation appointed in New York, brought suit upon certain notes exe-

[1] Litchfield Bank v. Peck, 29 Conn. 384; Moise v. Chapman, 24 Ga. 249; Devendorf v. Beardsley, 23 Barb. 656; See also Van Wagoner v. Paterson Gas Light Co. 23 N. J. Law, 283; Hyde v. Lynde, 4 N. Y. 387; Berry v. Brett, 6 Bosw. 627; Williams v. Babcock, 25 Barb, 109; Thomas v. Whallon, 31 Barb. 172; Colt v. Brown, 12 Gray, 233; Brooks v. Bigelow, 142 Mass. 6 (1886).

[2] Williams v. Babcock, 25 Barb. 109; Bell v. Shibley, 33 Barb. 610; Savage v. Medbury, 19 N. Y. 32; Shaughnessy v. Van Rensselaer Insurance Co. 21 Barb. 605.

[3] Litchfield Bank v. Peck, 29 Conn. 384. But where the defendant is himself a participant in the formation of a fraudulent banking company he can not plead such fraudulent organization against its receivers in an action to enforce payment of his subscription. Litchfield Bank v. Church, 29 Conn. 137. See also Farmers and Mechanics' Bank v. Jenks, 7 Metc. 592.

[4] Chase v. Petroleum Bank, 66 Pa. St. 169.

[5] Corbin v. De La Vergne, 44 N. J. Law, 70.

[6] Nagle v. Lyman, 14 Cal. 450.

cuted by a citizen of Massachusetts, but received by them as part of the assets of the corporation, the defendant was not allowed to make the defence that the notes had been attached in Massachusetts by a creditor of the corporation after the appointment of the receivers, upon the ground that the notes being in possession of the receivers in New York, the courts of Massachusetts had no jurisdiction over them.[1]

Section 706. **The Appointment Can Not be Attacked in a Collateral Action.** — It seems to be establised that the regularity, propriety, or necessity of the appointment of a receiver is not to be questioned, in a merely collateral action, at least by parties or privies to the action in which the appointment was made.[2] As to the right of other parties in this respect there seems to be a difference of opinion. In a leading case it was held that, if proof of the appointment be made by proper record evidence, such proof is conclusive, it being considered not material whether the action of the court in making the appointment was proper or not, so long as the order by which it was made remains unchallenged of record.[3] On the other hand it has been held that to a suit by a receiver to collect an unpaid subscription, a shareholder may aver that the receiver was improperly appointed by a decree not binding on the shareholder.[4]

The validity of the appointment can not be assailed in an action by the receiver because of defects in the bill in the proceeding in which the appointment was made.[5]

Section 707. **Of Set-off Generally.** — Questions concerning defences to actions brought by receivers occur most frequently in cases where the defendant seeks to interpose a set-off to the receiver's claim. Whether or not a set-off may be allowed as a

[1] Osgood v. Maguire, 61 N. Y. 524.

[2] See section 185, *supra*, and cases there cited.

[3] Vermont and Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792; Case v. Marchaud, 23, La. Ann. 60, an action upon a note wherein it was held that it is sufficient for the maker of a note to know that the receiver was appointed, that he held the note and that by paying it he might be discharged. See also Attorney-General v. Guardian Mutual Life Insurance Co. 77 N. Y. 272; Jay v. DeGroot, 17 Abb. Pr. 36.

[4] Chandler v. Brown, 77 Ill. 333. In commenting on this case Mr. Taylor, in his philosophical treatise on Corporations, section 543, says: "But this doctrine may perhaps be of questionable correctness, or at least application, since the shareholder could have intervened in the proceeding by which the receiver was appointed," and cites Schoonover v. Hinckley, 48 Iowa, 82.

[5] Comer v. Bray, 3 So. R. 554.

The right to collaterally attack the order of appointment is fully discussed in section 185.

defence, depends very largely upon whether the receiver sues as the representative of the corporation or other party whose assets he has, or on behalf of the creditors, and also upon whether the right sought to be set-off accrued to the defendant before or after the appointment of the receiver.

The general principle as to demands or choses in action in favor of the original party of whose property a receiver is appointed is that the receiver's right to enforce them is subject to all equities existing between the defendant and the original party.[1] So it has recently been held that a lessee, in a suit by a receiver for rent, may avail himself of whatever defences, counter claims, or set-offs he might have pleaded in a suit by the lessors.[2] And, in a leading case in Massachusetts, in which the receiver of a bank brought suit upon a note found among the assets of the bank, the defendant was allowed to set-off the bills and notes of the bank which he had received in the ordinary course of business before the time when the assets of the bank were sequestrated for the benefit of its creditors by an injunction for that purpose; but all the bills of the bank which he received after the injunction were not allowed to be set-off.[3]

Upon the same principle, it was held in New York that the same right of set-off exists against a note in the hands of a receiver of an insolvent corporation which would have existed against it in the hands of the corporation, and that the fact that the note was not payable at the time of the appointment of the receiver made no difference.[4] Conversely, a cause of action or demand against a bank assigned to a debtor of the bank after a bill for a receiver has been filed against it, and especially after the appointment, will not be allowed as a set-off in a suit by the receiver.[5] The burden of proof to show that the demand sought to be set-off accrued before the appointment rests upon the defendant who seeks to establish it.[6]

But a defendant in a suit brought by a receiver is not always allowed to set-off claims which would be good against the original party. In a leading New York case the court, looking upon the receiver as the representative of the creditors rather than of the corporation, refused to permit a defendant, in a suit by the re-

[1] Colt v. Brown, 12 Gray, 233, and Hade v. McVay, 31 Ohio St. 231.

[2] Cox v. Volkert, 86 Mo. 505, 511.

[3] Colt v. Brown, 12 Gray, 233; Clarke v. Hawkins, 5 R. I. 219. See also State Bank v. Receivers of Bank of Brunswick, 3 N. J. Eq. 266.

[4] Berry v. Brett, 6 Bosw. 627.

[5] Lanier v. Gayoso Savings Institution, 9 Heisk. (Tenn.) 506.

[6] Smith v. Mosby, 9 Heisk. 501.

ceiver upon a note due to the corporation whose assets he had in charge, to off-set a judgment which he had obtained against the receiver upon a note due to him from the corporation, holding that the judgment against the receiver determined only the legal validity of his claim, but that it must take its chances with other valid debts against the estate of the insolvent, and that to allow it as a set-off would be to give him a preference to which he was not entitled over other creditors.[1]

Section 708. **Set-Off of Claims Acquired After the Appointment.**— The rule which allows, in a suit by a receiver, the set-off of such demands as would be the proper subject of set-off if the suit were brought by the person or corporation originally entitled, is confined with strictness to such demands as existed in favor of the defendant at the time the receiver was appointed. This seems to be necessary in order to secure to all creditors their equal rights and to prevent inequitable preferences. In accordance with this principle the maker of a note can not, in a suit brought upon it by the receiver of the property of the payee, set-off a demand against the payee which had not matured before the note was due or before the receiver was appointed.[2] But this rule will not apply to just counter-claims against the receiver for services rendered to the estate at his request, after his appointment,[3] nor for services rendered to a corporation pending proceedings for the appointment of a receiver.[4]

Section 709. **Set-Off of Claims Arising out of Other Transactions.**— Ordinarily, when the debt or demand sought to be set-off against the receiver of a corporation, arises out of some transaction or right other than that sued upon, it is not to be allowed as a set-off. So when the receiver of an insolvent bank instituted a suit against a stockholder for an unpaid subscription to its capital stock, the defendant was not permitted to set-off against the demand the amount of his deposit in the bank. This decision proceeds upon the theory that the capital stock of a bank is a trust fund for the security of persons dealing with it, and that it should be kept for the equal benefit of all; to allow, therefore, the shareholder to off-set a personal demand against it would give him a preference which

[1] Clark v. Brockway, 3 Keyes, 13; s. c. 1 Abb. Ct. of App. Dec. 351.

[2] United States Trust Co. v. Harris, 2 Bosw. 75; Osgood v. Ogden, 4 Keyes, 70.

[3] Davis v. Stover, 58 N. Y. 473.

[4] Cook v. Cole, 55 Iowa, 70, otherwise as to services rendered after the appointment.

would defeat, *pro tanto*, the object of the fund.[1] This rule seems, at first sight, to have been overlooked in a case in the same state where a debtor was allowed to off-set his deposit against a suit by the receiver upon a note, but this decision was controlled by the terms of a statute which expressly authorized receivers of insolvent banks to allow just set-offs, in all cases where it should appear to them that they ought to be allowed either at law or in equity.[2] In Pennsylvania the rule was applied to a case in which one who purchased part of the assets of a partnership from the receiver of the partnership property was not allowed, in a suit brought by the receiver for the purchase money, to off-set a claim for rent due to him from the firm.[3]

Section 710. **Set-off Where the Receiver Represents the Creditors.**— If, in a suit brought by the receiver, he be regarded as the representative of the creditors rather than of the corporation, the defendant will not be allowed to off-set a claim which is capable of being made the foundation of an independent action, the reason being that in such a case he is, to the extent of his claim, a creditor of the corporation, and entitled only to the same rights and remedies as are to be accorded to other creditors. If, therefore, he be permitted to set-off such a claim against the suit of the receiver, he practically acquires a preference over other creditors; and, moreover, if the receiver represents the creditors, a claim against the corporation is not strictly a subject of set-off against their suit in his name. Thus when receivers of a corporation sued a shareholder to recover dividends illegally paid by the corporation while it was insolvent, the defendant was not allowed to set-off claims growing out of other and independent transactions.[4]

Section 711. **The Price Paid for Assets Illegally Transferred Cannot be Recouped.**—It has been decided in New York, in a case where the cashier of an insolvent bank, for the purpose of raising funds to redeem its circulating notes, sold and transferred valuable notes belonging to the bank, to a director who knew of the insolvency, for an insufficient consideration, that the director was liable to account to the receiver of the bank subsequently appointed, for

[1] Williams v. Traphagen, 38 N. J. Eq. 57.

[2] Van Wagoner v. Patterson Gas Light Co. 23 N. J. Law, 283. As to the validity of a claim to off-set the aliquot part of a joint debt which had been paid by the person sued by the receiver of the property of the person jointly liable, see Chenault v. Bush, 2 S. W. R. 160 (Ct. of App. Ky. 1886).

[3] Singerly v. Fox, 75 Pa. St. 112.

[4] Osgood v. Ogden, 4 Keyes, 70. See also Clark v. Brockway, 3 Keyes, 18; s. c. 1 Abb Ct. of App. Dec. 351.

the proceeds of the notes, upon the ground that the sale was fraudulent and void, and that he could not claim as against the receiver, by way of recoupment, the price he had paid for the notes.[1]

III.

SUITS AGAINST RECEIVERS.

A.

Remedies, Procedure, Etc.

Section 712. **Substitution in Pending Actions — Receiver's Rights as to.** — The case of Wilson v. Wilson,[2] determined the law and practice regarding the substitution of a receiver as defendant, in place of the party over whose property he is appointed after the commencement of an action, so satisfactorily that it has remained substantially unchanged by later decisions. In that case it was said that a suit properly commenced is neither barred nor abated by the appointment of a receiver of one of the defendants, *pendente lite*. At most such appointment will only render the suit defective, so as to make it irregular for the plaintiff to proceed until the receiver is brought before the court by a supplemental pleading in the nature of a bill of revivor. Even if such subsequent appointment of a receiver constituted a valid defence, it could not be pleaded as a bar to the suit generally, but should be pleaded merely in bar of the further continuance of the suit in analogy to the form of pleading in similar cases in suits at law.[3] Where, by the appointment of a receiver of one of the defendants *pendente lite*, a suit has become so defective that it is improper for the complainant to proceed until the receiver is brought before the court, the proper course for the other defendant is to apply for an order that the complainant bring the receiver before the court, by a supplemental bill in the nature of a bill of revivor within a time to be fixed, or that the bill be dismissed; and that, in the meantime, all proceedings be stayed.[4] So it has been recently held that actions pending against a corporation at the time of its dissolution must be revived in the name of the receiver; but this procedure is not necessary if the receiver voluntarily make himself a party to the action.[5]

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[1] Gillett v. Phillips, 13 N. Y. 114. As to pleas of fraud in which the defendant had participated, see Litchfield Bank v. Church, 29 Conn. 137; Farmers & Mechanics' Bank v. Jenks, 7 Metc. 592.

[2] 1 Barb. Ch. 592.

[3] Wilson v. Wilson, 1 Barb. Ch. 592.

[4] Id.

[5] People v. Knickerbocker Life Ins. Co. 7 N. Y. State Rep. 287 (Sup. Ct.

A receiver is a stranger to all proceedings which he finds in progress at the time of his appointment, until he is regularly brought before the court. He cannot interfere in a pending suit, as by giving notice of a motion or conducting an appeal in his own name, unless he has been made a party to the action by order of court.[1] Whether a receiver shall be permitted to defend an action already pending against his principal is wholly discretionary with the court.[2] There is no necessity for making a receiver a party defendant when the plaintiff's rights and remedies do not extend beyond the defendant for whose property he is appointed; right to relief from the receiver ought to be stated and prayed for against him.[3]

But if the effect of the action, if successful, would be to relieve the receivers of a large portion of their duties, and to that extent would be a virtual removal of them from their office, they should be allowed the opportunity to defend, and in such a case they ought to be allowed to come in as defendants.[4] It is also held that the receiver himself should make the application to be joined as a defendant with a corporation over which he has been appointed, and that the refusal of such an application made by the corporation is not error;[5] nor is the plaintiff bound to bring in the receivers.[6]

The appointment is not sufficient ground for dissolving an attachment previously issued against the corporation; the plaintiff should have the receiver substituted and then proceed with his action.[7]

Genl. term, 1887); s. c. N. Y. Daily Reg., July 27, 1887. In this case, which was an appeal from an order disallowing a claim against a receiver and the property in his hands, a judgment had been obtained against the corporation in a United States court in Tennessee before its dissolution, from which a writ of error was taken to the supreme court. After his appointment the receiver took charge of the proceedings on the writ of error, although he was not formally made a party defendant. Upon a new trial the judgment was rendered upon which the present proceeding for an order allowing the claim against the receiver was founded. McCulloch v. Norwood, 58 N. Y. 563, distinguished.

[1] Tracy v. First National Bank of Selma, 37 N. Y. 523. See also Hays v. Lycoming Fire Ins. Co. 99 Pa. St. 621, where the court refused to prevent a creditor from prosecuting proceedings in garnishment from an attachment made before the receiver was appointed.

[2] Patrick v. Eells, 30 Kan. 680.

[3] Arnold v. Suffolk Bank, 27 Barb. 424.

[4] Smith v. Trenton Delaware Falls Co. 4 N. J. Eq. 505.

[5] Mercantile Ins. Co. v. Jaynes, 87 Ill. 199.

[6] Mercantile Trust Co. v. Pittsburgh & W. R. R. Co. (U. S. Circ. Ct. W. D. Penn., 1887) 29 Fed. R. 732, holding that the appointment of receivers of a railroad company, pending statutory proceedings in another court against the company for the assessment of construction damages, does not interfere with the prosecution thereof, nor is the plaintiff therein bound to bring in the receivers. It is the receiver's business to intervene and make defence, if it be to the interest of the parties that they represent that they should do so.

[7] Pickersgill v. Myers, 99 Penn. St. 602.

A petition by a receiver to be made a defendant in an action pending against the firm whose assets he has in charge, which states, upon information and belief only, that collusion existed between the plaintiffs and one or more of the defendants, and which does not name any one of the defendants, nor give the source of information, nor specify why it was not verified by the person from whom the information was obtained, is sufficient to support an order allowing him to be made a defendant.[1]

Section 713. **Of the Remedies Against Receivers.**—Ordinarily the remedies against receivers in cases affecting the estate committed to them, are the same as would be appropriate against the original owners of the property; but the relation of the receiver to the court which appoints him, and the practice of administering the trust in that court in such a way as to protect the fund, and to secure equality among creditors, as well as to avoid a multiplicity of suits, have given rise to the practice of requiring suitors to proceed by petition in the principal case instead of by a separate suit, whenever their rights can be fully determined and secured in that way.[2] So it has been held in Massachusetts that a person who has purchased an estate subject to a mortgage given by a former owner to a bank, can not maintain a bill in equity against the receivers of the bank to procure a cancellation of the mortgage, upon the ground that it was obtained by the false and fraudulent representations of the bank, but that if he have any remedy in equity, he must proceed by a petition in the cause in which the receivers were appointed.[3]

Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto, by coming in and presenting his claim under the decree and submitting himself to the jurisdiction of the court, for the settlement and adjustment of his claim upon the fund to be distributed, as directed by the decree or order of the court under which such claim is presented.[4] The remedy ordinarily available to the injured party may, however, be affected by the condition of the receivership; as, e. g., where one who had entered into a contract with a receiver who afterwards refused to allow him to perform it, brought a suit in equity against his successor to recover damages, it was held, on

[1] Honegger v. Wettstein, 94 N. Y. 252, 262.

[2] First National Bank v. E T. Barnum Wire & Iron Works Co. 58 Mich. 315; People v. Bank of Dansville, 39 Hun, 187.

[3] Porter v. Kingman, 126 Mass. 141, 142.

[4] Matter of City Bank of Buffalo, 10 Paige, 378.

demurrer, that a court of equity would entertain jurisdiction of the suit, upon the ground that the contract having been made with a former receiver, the subsequent receiver could not be sued at law thereupon, and because the claim was against the trust funds of the company, which were still under the control of the court.[1]

Section 714. **Of Intervening Proceedings—Seeking Relief in the Receivership Suit—Independent Actions.**—One of the reasons assigned to support the rule requiring the consent of a court to sue its receiver is that the court has the right to direct the settlement of claims against the receiver to be determined in the receivership proceedings by intervention, the filing of an intervening petition. There are many claims and difficulties attending a receivership proceeding which may be adjusted and relief granted only in an intervening proceeding, while claims which are the proper subject of independent actions, and in respect of which the parties are entitled to trial by jury, may be permitted to be determined in independent suits. The claims meant are those of persons not parties to the receivership proceding.

It has been the practice, but rarely now, to require all suitors to intervene in the receivership proceeding, and to refer the trial of issues of facts to a jury. But such practice has been found to be cumbersome and unsatisfactory, and has been abolished as to receivership proceedings in the federal courts, in certain cases, by the act of congress which permits the receivers of those courts to be sued in any court without leave.[2]

When, because of the nature of the claim or complaint it can be properly heard and determined only in an intervening proceeding, or when the court directs the petitioner to intervene, such is done by filing in the court where the receivership proceeding is pending, and in the proceeding, a petition, in which is set forth the claim or complaint as to which relief is sought, and with leave of the court.

This procedure of intervention is the remedy to be pursued by persons not parties to the receivership proceeding, which is the filing of a petition in such proceeding praying permission of the court to intervene, and asking for some relief. The petition should describe the proceeding in which it is filed, contain a statement of the claim, and pray for the relief desired. The petition being entertained by the court, the intervenor is thereafter entitled to the same rights as though originally a party to the main suit, including that of appeal.

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[1] Kerr v. Little, 39 N. J. Eq. 83. [2] Sec. 659.

Where, after a receiver had taken possession of partnership property it was attached, it was held the attaching plaintiff had the right to intervene for the purpose of asserting his alleged lien.[1] In the case cited this was said: "But in as much as the property came into the hands of the receiver before he levied his attachment upon it, in order to successfully assert his claim and lien thereupon, it seems necessary that he should obtain a vacation of the order appointing the receiver. Hence he is entitled in some appropriate proceeding to attack the validity of such appointment. But a summary proceeding by motion is not the appropriate method of making such attack. This can only properly be done upon the petition of the party interested, setting forth the facts upon which he relies to obtain a vacation of the appointment."

Leave to interplead is necessary.[2]

A receiver was appointed of a street railway company which was to use certain tracks in connection with another company, each to pay one half the cost of construction. A controversy arose as to the proper procedure by which the cost of construction should be determined, the court deciding that such should be done in an intervening proceeding, saying: "As to the manner of determining such question, there has been some discordance of opinion among judges. * * * The cases all hold that while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting. The rule applies to all cases of damage to persons or property, whether occasioned prior or subsequent to the appointment of the receiver."[3] It was held that the objection that such a proceeding would deprive the petitioner of the right of trial by jury was not meritorious, as the question involved was one of eminent domain and properly triable by a jury.[4]

A mortgagee who seeks relief against the purchaser of property sold on foreclosure by a receiver, upon the ground of collusion with the receiver, should proceed in the action wherein the receiver was appointed. Where a suit was pending against a corporation when it was placed in the possession of a receiver, and the plaintiff afterward presented his claim to the receiver, it was held that this was

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[1] Jacobson v. Landolt, 73 Wis. 142.
[2] Id.
[3] Pacific Railway Co. v. Wade, 91 Cal. 449.
[4] Lockwood v. Reese, 45 N. W. R. 313.

not a binding election of remedies, and that the claimant could continue to prosecute his suit against the corporation.[1]

Concerning intervening proceedings Brewer, J., when on the circuit bench, said: "It is for that court * * * to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to digest and settle them without suit, as in its judgment may be most beneficial to those interested in the estate."[2] And upon the same subject the supreme court of Wisconsin has said: "It rests, therefore, in the discretion of the court to allow a party claiming rights against its receiver to bring an independent action against him, or to compel such party to proceed against him by petition in the action in which he is receiver. With the exercise of such discretion this court can not interfere on appeal, unless there has been a manifest abuse of it."[3]

It has been held that a purchaser of land subject to a mortgage given by the vendor to a bank, can not maintain a bill in equity against the receivers of the bank to procure a cancellation of the mortgage on the ground that it was obtained by the false and fraudulent representations of the bank; that the remedy must be by petition in the cause in which the receivers were appointed.[4]

Where an intervening petition is filed in a chancery suit setting up against the receiver appointed in such suit a cause of action at law, it is proper to direct the trial of the issues raised by such petition by jury. The determination of such issues so tried is properly reviewed by writ of error and not by appeal, because it is an action at law.[5]

A telegraph company having a contract with a railroad company to erect wires along the latter's right of way, and the railroad company having been placed in the hands of a receiver, it was held that there was no more proper procedure than by intervening in which the telegraph company might establish its rights.[6]

It has been broadly and correctly asserted that "when a court has taken possession of property and appointed a receiver, it has power to try all adverse claims in the principal suit."[7] Courts fre-

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[1] Pine Lake Iron Co. v. Lafayette Car Works, 58 Fed. R. 853.

[2] Porter v. Sabin, 36 Fed. R. 475.

[3] Mechanics' National Bank v. Landauer, 68 Wis. 44.

[4] Porter v. Kingman, 126 Mass. 141.

[5] Rouse v. Hornsby, 14 U. S. C. C. App. 377; affirming s. c. 67 Fed. 219.

[6] Union Trust Co. v. Atchison, Topeka & Santa Fe Railroad Co. (N. M.), 43 Pac. R. 701.

[7] *In re* Herbert, 63 Hun, 247.

quently deny applications for leave to sue receivers and require the petitioner to intervene for the protection of his rights; such action is not an abusive exercise of discretion.[1]

A claimant of property may intervene in the receivership proceeding to recover the possession of property held by the receiver.[2]

In the order appointing receivers of railways Judge Caldwell, eighth federal judicial circuit, has generally made the following provision: "For all liabilities incurred by receivers in the operation of the road they may be sued in any court of competent jurisdiction, or the claimant may, at his election, file an intervening petition in this cause and have his demand adjudicated in this court."[3]

Section 715. **Where Receivers May be Sued.**—We have already seen that a receiver has no right to bring suits in states other than that in which he was appointed, unless by the exercise of the principle of comity. Upon the same principle the courts refuse to allow receivers to be sued in the courts of other states. Accordingly, it has been held that receivers appointed in another state can not be sued in the courts of New York, although they have in their hands property in New York; and if such a suit be begun and an attachment granted, it will be vacated on motion, upon the ground that such an attachment would take the very property which is in the course of administration by another court.[4]

Section 716. **When the Receiver is Necessarily a Party.**—Where a receiver of a railroad company refused to carry out a prior contract of the company with an express company, and the latter, with the consent of the court, brought a bill for specific performance against the receiver and the railroad company, it was held that the receiver was the only necessary party defendant.[5]

So also it has been held that a receiver appointed for the settlement of partnership affairs with power to collect and receive all moneys and property of the firm, and out of the proceeds to pay the debts of the firm, is a necessary party to suits affecting partnership

[1] Mechanics' National Bank v. Landauer, 68 Wis. 44; People v. Remington, 45 Hun, 347.

[2] Winchester v. Davis Pyrites Co. 14 U. S. C. C. A. 300; s. c. 67 Fed. R. 45; affirming s. c. 64 Fed. R. 664.

[3] Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R. 551.

[4] Killmer v. Hobart, 8 Abb. N. C. 426; s. c. 58 How. Pr. 452 (N. Y. Sup. Ct. special term). But see, *contra*, Paige v. Smith, 99 Mass. 395; Hibernia National Bank v. Lacombe, 21 Hun, 166, affirmed 84 N. Y. 367; but in this case the receivers were made defendants upon their own application.

[5] Express Co. v. Railroad Co. 99 U. S. 191, 199.

property.[1] But in proceedings to foreclose a mortgage given by a corporation, over which receivers were appointed after a decree *pro confesso* which established the plaintiff's rights, it is not necessary to make the receivers parties defendant; but if they apply to be admitted as defendants, the court may properly grant their request.[2] A receiver appointed in an action for the dissolution of a partnership is not a necessary party to a suit by certain creditors to set aside alleged fraudulent disposition of the firm's property made before his appointment or to establish the prior right of such creditors to the assets in his hands.[3] A receiver appointed to take charge of mortgaged property and to collect the rents is not a necessary party to a bill subsequently filed to foreclose the mortgage.[4]

Section 717. **Injunctions — Interpleas.**— The receiver being an officer of the court under its supervision, and subject to its order, and any person being allowed to apply directly to the court appointing him for an order by which the receiver may be directed and controlled, courts of equity will not, as a general rule, hear applications for injunctions against their receivers.[5] In all such cases the proper practice is by an application directly to the court whose officer the receiver is, for an order granting leave to bring suit against him, or for immediate relief by the exercise of its supervisory control over him.[6] In case two or more parties are contestants for the same fund in the hands of the receiver, he may, by the proper proceedings as in the case of other trustees, compel them to interplead and to have their respective rights in this way adjudicated and determined.[7]

Section 718. **The Trust Estate is Not Subject to Attachment or Execution — Distress.**— The possession of the receiver being considered the possession of the court, the property in his hands is looked upon as being *in custodia legis*, and, on that account, it is not to be taken upon any writ of attachment or execution while in his possession.[8] In compliance with this rule it has been decided that the recovery of a judgment against partners after the appoint-

[1] Kirkpatrick v. McElroy, 41 N. J. Eq. 539.

[2] Willink v. Morris Canal & Banking Co. 4 N. J. Eq. 377.

[3] Mechanics' National Bank v. Landauer, 68 Wis. 44.

[4] Heffron v. Gage (Ill.), 36 N. E. R. 569.

[5] Smith v. Earl of Effingham, 2 Beav. 232; Winfield v. Bacon, 24 Barb. 154, where an injunction to restrain a receiver from prosecuting an action which he had been authorized by the court to bring, was refused.

[6] Id.

[7] Winfred v. Bacon, 24 Barb. 154.

[8] Adams v. Haskell, 6 Cal. 113; Hooper v. Winston, 24 Ill. 353.

ment of a receiver for the benefit of creditors, does not create a lien upon any of the firm property or funds in his hands, and such property or funds can not be levied upon by execution or reached by garnishment because it is already *in custodia legis*.[1] So also the owner of a judgment lien upon land in the possession of a receiver can not levy execution thereon, but must apply to the court in chancery, which will protect his interests when making sale or distributing the proceeds of the land.[2] If, however, he have good reason to believe that the land should not have gone into the hands of the receiver, he may apply to the court which appointed him for an order discharging it from his custody, so that he may levy execution upon it.[3] On the other hand, if the title to land held by a receiver, having been contested, be, by a decree of a court, finally vested in one of the parties to the suit, it is subject to execution for his debts even though not formally discharged by an order of court.[4] But it has been held by a federal court that property in the hands of a receiver, like other property, may be seized and sold for just and legal taxes.[5]

Section 719. **Of the Receiver's Defences.** — It seems to be conceded that receivers when made defendants in actions pending at the time they are appointed or when sued, after leave of court has

[1] Jackson v. Lahee, 114 Ill. 287, 295.

[2] Wiswall v. Sampson, 18 How. 52.

[3] Robinson v. Atlantic, etc. R. R. Co. 66 Pa. St. 160.

[4] Very v. Watkins, 23 How. Pr. 469.

[5] Central Trust Co. v. Wabash, St. L., etc. Ry. Co. 26 Fed. R. 11. As to the right to levy upon and sell the property of a railway in the hands of a receiver appointed by a federal court, for unpaid taxes due to a state, see State v. Atlantic & Gulf R. R. Co. 3 Woods, 434. In Corn Exchange Bank v. Blye, Receiver, 101 N. Y. 303 (1886), it was held, in as much as a receiver of a national bank can acquire no right to property merely in the custody of the bank, as against its owner, that section 5342 U. S. Rev. Stat., providing that "no attachment, injunction, or execution shall be executed against any such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court," does not prohibit the issuing of a requisition directing the sheriff to take into his possession the property, to obtain which the suit was brought, and that the receiver can retain the possession only by giving the security required, as in cases against other defendants. In a recent case it was decided that a receiver does not become liable for rent of leased premises by entering upon them in order to take possession of and to sell and dispose of the goods and effects of the lessee under order of court, and that the landlord in such case will not be entitled to a lien upon the proceeds of the goods sold for rent becoming due after the sale and after the removal of the goods by the purchaser, notwithstanding a statutory provision allowing the landlord to follow and distrain goods for rent due after their removal from the premises, provided they have not been sold to a *bona fide* purchaser without notice. Gaither v. Stockbridge, Receiver (Ct. of App. Md. 1887), 9 Atl. Rep. 632.

been obtained, may make any defence which could have been made by the party, or corporation whose property they have in possession,[1] that they can not make any defence to which such parties are not entitled, unless it be one arising out of the debtor's collusion in fraud of the creditors whose rights are represented by the receivers, seems reasonable and just.[2]

Receivers in their official capacity can neither be bound by any implied waiver nor can they expressly waive any technical legal defence, nor abandon an equitable one.[3] They may defend an action of trespass for goods notwithstanding their appointment is not regular.[4]

An action against a receiver should not be restrained on the ground that a former judgment has disposed of the matters involved in the action, but the receiver should be left to set that up as a defence.[5] After a receiver has taken possession of property by virtue of his appointment, he can not defend an action against him to recover the property or any part of it, by setting up that the order has been rescinded without prejudice to third parties.[6]

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[1] Davis v. Duncan, 19 Fed. Rep. 477.

[2] Honegger v. Wettstein, 94 N. Y. 252, 260, where a receiver, after being allowed to intervene in a suit brought by foreign creditors against the firm represented by him, interposed the defence that the contract sued upon was void on account of the undervaluation of goods by the plaintiffs at the Custom House, which defence had not been made by the firm. The court, Miller, J., said, although the case was not decided upon this point: "It would seem that the receiver, who represents the defendants, should not be permitted to occupy any better position in the defence than the defendants themselves. His whole title is derived from the defendants, who do not claim to defend the action upon any such ground as is set up in the answer of the receiver. The only ground upon which he can insist on such a defence, which the defendants refuse to make, is that he repsents the creditors, and hence it may be required in order to protect their rights. This is not enough, and he should not be allowed, on behalf of, and for the benefit of the defendants, and without their request or approval, and in opposition to their refusal, to insist upon the same."

[3] McEvers v. Lawrence, 1 Hoffm. Ch. (N. Y.) 172.

[4] Brush v. Blanchard, 19 Ill. 31. In this case the appointment was made by a master in chancery, who has no power in Illinois to make appointments, but the papers had been regularly issued under the seal of the court as if the appointment were regular.

[5] Jay's Case, 6 Abb. Pr. 293.

[6] Peacock v. Pittsburgh Locomotive and Car Works, 52 Ga. 417; Miller v. Loeb, 64 Barb. 454. As to how far the purchasers of a railway from a receiver will be held liable upon covenants made by him, see Martin v. New York, S. & W. R. R. Co. 36 N. J. Eq. 109. Where a receiver of an insolvent railroad corporation wrongfully took possession of land and constructed a railroad upon it, and, after his discharge the corporation resumed control of the railroad, including the land so taken by him, it was held that the owner could maintain an action against the corporation. Bloomfield v. Van Slyke (Sup, Ct. Ind. 1886),

Section 720. **Of Judgments Against the Receiver — Execution — After Discharge.** — In an action brought by a creditor of a corporation against a receiver thereof, in his official capacity, no personal judgment can be rendered against him, but the judgment must be entered against him as receiver, and must be made payable out of the funds held by him in that capacity,[1] and it must be so entered as to be enforceable only against the property in his custody.[2]

The fact that the receiver has been discharged during the pendency of the action, and has transferred all property and assets held by him to another corporation or person, pursuant to an order of the court, does not render it improper subsequently to enter a judgment against him as receiver, when it is made payable out of funds applicable to that purpose which may thereafter come into the receiver's hands or under the direction of the court.[3]

But, as a general rule, a judgment can not be rendered against a receiver after his discharge.[4]

A judgment rendered against a corporation over which a receiver has been appointed in another state, in an action in which the receiver has not been made a party, is not binding upon the receiver in the state in which he was appointed.[5]

In an action against a receiver in his official capacity a judgment against him is in form against him officially, not personally, and is to be satisfied out of the trust funds.[6] A judgment in the ordinary form is improper; it must show on its face that it is against the receiver as such, and be made payable out of the funds held by him in such capacity in the due course of the administration of the receivership.[7]

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8 N. E. Rep. 269. As to the right of a purchaser of property from a receiver to recover damages for his mismanagement of the estate, after his discharge without objection, see Leman v. McQuown, 31 Fed. Rep. 138 (U. S. Circ. Ct. Col., May, 1887), where such a claim was made and rejected upon an application to assess damages on the injunction bond given by the plaintiff at whose suit the receiver was appointed. It has been held that money collected by a receiver, acting under a void appointment as such, may be recovered from him by the party entitled to it, in an action for money had and received to the use of the plaintiff. Johnson v. Powers, 32 N. W. Rep. 62 (Sup. Ct. Neb., Feb. 1887).

A petition containing two counts, one against the receiver personally and one against him officially is demurrable for misjoinder of causes. Brandt v. Siedler, 31 N. Y. S. 112.

[1] Text approved in McNulty v. Ensch, 134 Ill. 46; Woodruff v. Jewett, 37 Hun, 205, 211.

[2] Commonwealth v. Runk, 26 Pa. St. 235.

[3] Woodruff v. Jewett, 37 Hun, 205.

[4] Fordyce v. Du Bose (Tex.), 26 S. W. R. 1050; Texas & Pacific Railway Co. v. Watson (Tex. Civ. App.), 24 S. W. R. 952.

[5] McCulloch v. Norwood, 58 N. Y. 562, reversing s. c., 4 Jones & S. 180.

[6] Combs v. Smith, 78 Mo. 32.

[7] McNulty v. Ensch, 134 Ill. 46; Brown v. Brown, 71 Tex. 355.

The following form of judgment against a receiver has been approved: "Have and recover of and from said defendant, John McNulta, receiver of the Wabash, St. Louis & Pacific Railway Company, the said sum of $6,000 as his damages aforesaid, to be paid in due course of administration of the trust, together with his costs and charges herein expended."[1]

In this case it was said: "The judgment is, as it were, in the nature of a judgment *in rem*, and the *res* is the matter of the receivership, the administration in the chancery court of the trust, and the fund and property which are the subject of the trust. The receiver is sued as such, and merely because he is, for the time being, the tangible representative of the matter of the receivership."

The judgment should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership. It can not specify the particular fund out of which it shall be paid.[2]

No executory process can issue on a judgment against a receiver. The manner of paying the judgment is under the exclusive control of the court in which the receivership proceeding is pending, and to it there must be an application for its payment.[3] Execution can not be issued against a receiver; the judgment only operates as an established claim against the assets in the possession of the receiver.[4]

Section 721. **Of the Conclusiveness of Judgments Against Receivers.**— In a previous section it is asserted that a judgment against a receiver, rendered by a court having jurisdiction of the parties and subject-matter of the litigation, is conclusive and binding as to the liability of the receiver and the amount thereof.[5] It is proposed to here discuss this proposition and cite the authorities which support or deny it.

It has also been shown that the doctrine or rule stated is not abrogated or in any way affected by the act of congress of 1887, which permits receivers of federal courts to be sued without the consent of the appointing court "in respect of any act or transaction of his in carrying on the business connected with" the trust estate, but declares that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."[6]

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[1] McNulta v. Lockridge, 137 Ill. 270.

[2] Brown v. Brown, 71 Tex. 355.

[3] Irwin v. McKechnie (Minn.), 59 N. W. R. 987; Dillingham v. Hawk, 9 U. S. C. C. A. 101; s. c. 60 Fed. R. 494.

[4] Arnold v. Penn (Tex. Civ. App.), 32 S. W. R. 353.

[5] Section 659.

[6] Section 659.

It is apparent that, if a judgment against a receiver, when presented to the court having jurisdiction of the receivership proceeding for payment, may be modified, changed or rejected, the trial of the cause in which it was rendered would be but an empty and useless formality.

The order of Judge Caldwell made in the eighth federal judicial circuit in the receivership proceeding against the St. Louis, Arkansas and Texas Railway Company[1] provided that final judgments against the receiver should be allowed and paid as of course. On motion to change this provision Judge Caldwell said: "The court is asked to qualify the order relating to judgments recovered in state courts, by adding a proviso to the effect that, when it is shown that the judgment is for a grossly excessive amount, this court will reduce it to a just and reasonable sum. This court will not entertain the suggestion that its receiver will not obtain justice in the state courts. The act of congress gives the right to sue the receiver in the state.[2] The state court has jurisdiction of the parties and the subject matter, and its judgment against a receiver of this court is as final and conclusive as it is against another suitor. The right to sue the receiver in a state court would be of little utility if its judgment could be annulled or modified at the discretion of this court. It is open to the receiver to correct the errors of inferior courts of the state by appeal to the supreme court. But this court is not invested with appellate or supervisory jurisdiction over the state courts, and can not annul, affect or modify their judgments."[3]

The United States circuit court of appeals has declared that "the judgment of a state court is conclusive as to the existence and amount of the appellee's claim, but the time and manner of its payment must be controlled by the court appointing the receiver."[4] It was said judgments obtained against receivers in suits at law are not the result of trials of issues submitted by a court of chancery, in which cases the verdict is only advisory, not conclusive.

That judgments against receivers are conclusive is a proposition that has been approved by the highest national tribunal,[5] and by state and other federal courts.[6]

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[1] Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 41 Fed. R. 551.

[2] Citing Central Trust Co. v. St. Louis, Arkansas & Texas Railway Co. 40 Fed. R. 426.

[3] Citing Randall v. Howard, 67 U. S. 585; Nougue v. Clapp, 101 U. S. 551.

[4] Dillingham v. Hawk, 9 U. S. C. C. A. 101; s. c. 60 Fed. R. 494.

[5] Texas & Pacific Railway Co. v. Johnson, 151 U. S. 81; s. c. 14 S. C. R. 250.

[6] Central Trust Co. v. East Tennessee, Virginia & Georgia Railway Co. 59 Fed. R. 523; Garrison v. Texas &

Against this array of authorities and the plainest principles of reason the federal court in the eastern district of Louisiana, Pardee, J., assumed the power to reduce a judgment rendered against its receiver by a Texas court from ten to five thousand dollars, declaring that such judgment was not conclusive, and refusing to adopt the report of a special master finding the judgment to be conclusive.[1]

Section 722. **Of Appeals by the Receiver.**—Every claim presented against a fund in the hands of a receiver, if contested before the court, becomes in effect a suit against the receiver, which is ended by a final judgment allowing or rejecting the claim, and any party to the contest, dissatisfied with the result, may have the proceedings revised on appeal.[2] The receiver, as a party defendant to an action, has the same right to appeal from a judgment of the court affecting the interests of the estate represented by him, that the party or corporation to whom the estate originally belonged, would have had if the suit had been brought by them.[3] The form of the remedy does not destroy its substance, and the action of the court thereupon is reviewable upon appeal if the fund in litigation is exposed to any risks against which the law gives protection; and the jurisdiction to entertain an appeal is not affected by the question whether or not the allegation of danger may turn upon the hearing to have been unfounded.[4]

B.

Actions Growing Out of the Receivership.

Section 723. **The Liability of a Managing Receiver is Generally the Same as that of an Owner.**—In this country, where receivers are frequently empowered to manage and carry on the business of the parties or corporations of whose property they have the charge on behalf of the court—and this especially in the case of railway receiverships—their duties require them to enter into new contracts and obligations, and subject them to the same liabilities for damages for injuries, etc., as are incurred by others who carry on similar enterprises for their own benefit. Being actually engaged in business, justice to those with whom they deal demands that they

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Pacific Railway Co. (Tex. Civ. Ap.) 30 S. W. R. 725; Fordyce v. Withers, 1 Tex. Civ. Ap. 540; Dillingham v. Kelley (Tex. Civ. Ap.) 27 S. W. R. 806.

[1] Missouri Pacific Railroad Co. v. Texas & Pacific Railroad Co. 41 Fed. R. 311.

[2] Fagan v. Boyle Ice Machine Co. 65 Tex. 824, 831.

[3] Melendy v. Barbour, 78 Va. 544.

[4] First National Bank of Detroit v. E. T. Barnum Wire & Iron Works Co. 58 Mich. 315.

shall be held to the same accountability whether their liabilities arise in contract or in tort.[1] If a demand against a receiver arise from his having taken unlawful possession of propery which is not included in the trust, and which does not involve his administration of the trust, he may be held personally liable as in trespass, even though he took possession of the property under an order of court.[2] It must be borne in mind that in all these actions against the receiver, leave to bring the suit must first be obtained of the court appointing him, unless he be the officer of a federal court.[3]

Section 724. **Of Injuries Occurring Under the Receiver's Management.**—The greater number of cases involving the liability of receivers as such, arise out of claims for injuries received upon railroads operated by receivers. Such cases, it is well settled, are governed by the same rules of law relating to negligence, acts of fellow servants, responsibility for defective machinery, etc., as are applicable to similar cases when the corporation itself and not its receiver is defendant.[4] As a general rule, only the receiver in his official capacity, and the property in his charge are liable for injuries occasioned by himself, his agents or servants in charge of the corporate property, and before he can be sued license to do so must first be obtained of the court of which he is an officer.[5]

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[1] Little v. Dusenberry, 46 N. J. Law, 614, 641; S. C. 50 Am. Rep. 445, in which the court said: "It accords with sound principle and reason that a receiver exercising the franchise of a railroad company shall be held amenable, in his official capacity, to the same rules of liability that are applicable to the company while it exercises the same powers of operating the road." S. P. *Ex parte* Brown, 15 S. C. 518.

[2] Curran v. Craig, 22 Fed. Rep. 101.

[3] See section 659.

[4] Meara's Adm'r v. Holbrook, 20 Ohio St. 137, the leading case, in which Day, J., said: "In every view, therefore, it accords with sound principle and reason, that a receiver, exercising the franchises of a railroad company, should be held amenable in his official capacity to the same rules of liability that are applicable to the company while it exercises the same power of operating the road. In determining the case before us, then, it only remains for us to apply the ordinary principles controlling cases of this class." S. P. Winbourn's Case, 30 Fed. Rep. 167; Pope's Case, Id. 169; Potter v. Bonnell, 20 Ohio St. 159; Klein v. Jewett, 26 N. J. Eq. 474; Erwin v. Davenport, 9 Heisk. 44; *Ex parte* Brown, 15 S. C. 518; *Ex parte* Johnson, 19 S. C. 492. See also Ohio & Miss. R. R. Co. v. Davis, 23 Ind. 553; Nichols v. Smith, 115 Mass. 332; Blumenthal v. Brainerd, 38 Vt. 402; Paige v. Smith, 99 Mass. 395. In Iowa the question is settled by statute. Central Trust Co. v. Sloan, 22 N. W. Rep. 916; Sloan v. Central Iowa Ry. Co. 62 Iowa, 728; In Smith v. Potter (Mich.), 9 N. W. Rep. 273, the right to hold a receiver liable for an injury was questioned. *Contra*, Henderson v. Walker, 55 Ga. 481; Thurman v. Cherokee R. R. Co. 56 Ga. 376; Cardot v. Barney, 63 N. Y. 281. See also Beach on Contributory Negligence, section 121.

[5] Heath v. Missouri, K. & T. R. R. Co. 83 Mo. 617, 623; Rogers v. Mobile & Ohio R. R. Co. (Tenn. 1883), 16 Rep. 536.

A receiver acting as a common carrier is not a public officer entitled to immunity as such, but may be sued at law in his representative capacity, by leave of the court appointing him, as the company might be, for the negligence of his agents in operating the road resulting in injury to others.[1] Generally the receiver can not be held personally liable in actions brought against him in his official capacity, the judgment being entered only so as to affect the funds in his hands.[2] It has also been held that judgments in damage suits for injuries by servants of receivers are entitled to payment out of the current receipts; and if such income have been invested in betterments, then out of the proceeds of the sale to the extent of their value.[3]

The important case of Cardot v. Barney[4] seems to furnish a notable exception to the general course of decisions upon the question of the liability of receivers for injuries inflicted while they are operating the road. The ruling there was that one who is operating a railroad under the authority of a court who does not assume to act in any other capacity, and who has not held himself out as a carrier of passengers other than as an officer of the court, is not liable in an action for negligence causing the death of a passenger, when no personal negligence either in the selection of his agents or in the performance of any duty is imputed to him, but the negligence charged is that of subordinates, whom he necessarily and properly employs in compliance with the order of court. It has been suggested that this case is authority only upon the point that an *individual* liability can not be fastened upon the receiver,[5] and there seems to be nothing in the report inconsistent with the suggestion. It proceeds upon the theory that receivers of railways are

[1] Meara's Adm'r v. Holbrook, 20 Ohio St. 737; Little v. Dusenberry, 46 N. J. Law, 614, 637, where, however, the authority of the receiver to manage the road was conferred by statute, and the court said: "There was no intention on the part of the legislature to create a new public office and clothe the receiver who occupied it with the immunities of such office, and thereby enable him to shield himself, cover up the earnings and protect the stockholders and creditors from damages to others in operating the road." S. P. Newell v. Smith, 49 Vt. 255.

Where a receiver of a railroad in New Jersey was, in ancillary proceedings in New York, appointed receiver for the property of the road in that state, it was held that a suit against him by citizens of New York in the courts of that state to recover for injuries received in New Jersey while the road was operated by the receiver, can be removed to a United States court, the receiver being looked upon as a citizen of New Jersey. Davies v. Lathrop, 20 Blatchf. 397. *Contra*, Cardot v. Barney, 63 N. Y. 281.

[2] Commonwealth v. Runk, 26 Pa. St. 235.

[3] Ryan v. Hayes, 62 Texas, 42.

[4] 63 N. Y. 281.

[5] H. Campbell Black, Esq., in 26 Am. Law Reg. 302.

public officers, and, as such, are not answerable for the negligence or wrongful acts of their subordinates.[1] Subsequently, in a case where a receiver appointed by a court in Vermont, had, by the permission of that court, leased a line of railroad in New York and operated it in connection with the line in Vermont, the New York court held the receiver liable for injuries received by an employe upon the leased line, upon the ground that he was liable under his contract of lease, and that the fact that he was a receiver of a foreign court did not affect the case.[2]

Section 725. **The Receiver's Liability for Injuries Ceases with his Discharge.**—A receiver of railway property will not be held liable after he has turned over the property to the purchasers and has been discharged by the court, for injuries inflicted during the receivership through the negligence of his servants, although the suit be commenced before his discharge. In such a case his liability, being an official one, ceases with his discharge, unless the facts show that the injury occurred through his personal fault or negligence.[3] Although the proceeding against the receiver is in the nature of a proceeding *in rem*, rendering the property in his hands liable for the judgment, and is not against him personally,[4] a judgment for personal injuries recovered after he has settled his accounts, in a suit begun while he was in office, has been held to create no such lien against the property as can be enforced against a purchaser.[5]

The liability of purchasers of railroads from receivers, for injuries happening during the receivership will be considered hereafter.[6]

Section 726. **Corporation in a Receiver's Hands is Not Accountable for Injuries.**—It is well established that a railway corporation which is in the hands of a receiver who is operating the

[1] It had previously been held in the supreme court in New York, that a receiver although not personally liable for injuries caused by the negligences of his employes, would be liable in an action against him as receiver. Camp v. Barney, 4 Hun, 378; s. c. Thomp. & C. 622.

[2] Kain v. Smith, 80 N. Y. 458, reviewing and distinguishing Cardot v. Barney, *supra*. *Cf.* Fuller v. Jewett, 80 N. Y. 46.

[3] Ryan v. Hayes, 62 Texas, 42, approved and followed in International & G. N. R. R. Co. v. Ormond, 62 Texas, 274; Davis v. Duncan, 19 Fed. Rep. 477; Farmers' Loan & Trust Co. v. Central R. R. Co. 7 Fed. Rep. 537.

[4] Davis v. Duncan, 17 Fed. Rep. 477.

[5] White v. Keokuk & D. M. Ry. Co. 2 N. W. Rep. 1016 (Iowa). See also Lehigh C. & N. Co. v. Central R. R. Co. 42 N. J. Eq. 591; s. c. 8 Atl. Rep. 648 (March, 1877).

[6] Chapter on Sales.

road as a common carrier, under statutory provisions or by virtue of an order of court, is not accountable for injuries occasioned by the negligence of the employes of the receiver. If a corporation be sued for such injuries it has a perfect defence in the plea that at the time the injuries complained of were inflicted, it was in the hands of a receiver duly appointed and operating the road.[1] This rule is well founded upon principle, since the corporation, after the appointment, has no control over the employes of the receiver; and also for the further reason that, as we have just stated, the receiver is responsible for such injuries in his official capacity, and judgment may be had against the estate in his hands.[2]

Where a receiver and the railroad company were joined as defendants in an action for injuries caused by the servants of the receiver who was operating the road, it was held that the corporation was not liable for such negligence, and judgment against the corporation was arrested, but affirmed as against the receiver.[3] In pleading as a defence that a receiver has charge of its affairs, the corporation should set forth a copy of the order of his appointment, or the original.[4]

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[1] See Hicks v. International & G. N. R. R. Co. 62 Texas, 38; Rogers v. Mobile & Ohio R. R. 16 Rep. 536 (Tenn. 1883); Bell v. Indianapolis, C. & L. R. R. Co. 53 Ind. 57; Metz v. Buffalo, C. & P. R. R. Co. 58 N. Y. 61; Ohio & Miss. R. R. Co. v. Davis, 23 Ind. 553; Turner v. Hannibal & St. Joe. R. R. Co. 74 Mo. 602; Ohio & Miss. R. R. Co. v. Anderson, 10 Bradw. 313. See also International & G. N. R. R. Co. v. Ormond, 62 Texas, 274; Louisville, New Albany & C. R. R. Co. v. Cauble, 46 Ind. 277. *Contra*, Ohio & Miss. R. R. Co. v. Nickless, 72 Ind. 271, holding that the company can not plead, either in bar or in abatement, that it was in the hands of a receiver, and that the action was brought without leave of the court in which such receiver was appointed, although by bringing the suit without leave, the plaintiff may have been guilty of contempt. It has been held that this defence can not be taken advantage of by motion to dismiss for want of jurisdiction. Wyatt v. Ohio & Miss. R. R. Co. 10 Bradw. 289.

[2] See for full discussion of topic of this section, section 384.

[3] Memphis & Little Rock R. R. Co. v. Stringfellow, 44 Ark. 322. But see Railroad Co. v. Brown, 17 Wall. 445—where a railroad corporation was run on joint account of a receiver of a part of it and the lessees of the remaining part. It was held that an action would properly lie against the corporation itself for injuries sustained by a passenger at the hands of servants employed by the parties jointly operating the road; because the rule that the corporation is not liable in damages when the receiver is so liable is never to be applied, unless the possession of the receiver is exclusive, and the employes of the road are wholly controlled by him; in this case the receiver and the lessees would be jointly liable, and if so, the original company would also be responsible, for the servants, under such an employment, are as much the servants of the corporation as of the receiver and lessees.

[4] Ohio & Miss. R. R. Co. v. Fitch, 20 Ind. 498.

Where, however, a receiver, while operating a road, has used the income derived from the estate to purchase other property, which, upon his discharge is turned over to the corporation with its other property, it seems that the property so acquired may be held liable in equity, although belonging to the corporation, for damages, occasioned while the receiver was in possession, provided the rights of third parties do not intervene; such has been the ruling in a decision which based the liability upon the theory that the receiver has diverted the income.[1] It has also been held that, where a railway company neglects or refuses to build a fence along its right of way, after notice by the owner of adjoining land, the owner or occupant of such adjoining land may build the fence and bring his action to recover double the value thereof, against either the corporation owning the road, or any other party actually occupying or using it, and that in such an action against the railway company, it is no defence, so far as the corporation is concerned, that its property is in the hands of a receiver.[2]

Section 727. **The Corporation is Responsible upon Statutory Liabilities.**—But if the claim for loss or damage for which redress is sought, be founded upon a statute, the state courts have held that a railroad corporation, notwithstanding that it may be in the hands of a receiver, may be held responsible in the state courts.[3] This action of the state courts proceeds upon the theory that the appointment of a receiver does not affect the corporate existence of the company, its effect being merely to put the property of the corporation under the management, control and custody of the court while litigation is pending, and that where, by statute, the corporation is made liable — as e. g., for killing cattle when its road is not properly fenced — the receiver holds and operates the road subject to such liability.[4] In Indiana it has been adjudged that a statute authorizing owners of animals killed on a railroad to hold lessees, assignees, or receivers jointly liable with the corporation, and prescribing the mode of procedure,[5] gives state courts no jurisdiction over the property of railroad corporations, which are in charge of a receiver ap-

[1] Mobile & Ohio R. R. Co. v. Davis, 62 Miss. 271. See section 384.

[2] Ohio & Mississippi R. R. Co. v. Russell, 115 Ill. 52; s. c. 3 N. E. Rep. 561.

[3] Louisville, New Albany & C. R. R. Co. v. Cauble, 46 Ind. 277; Kansas Pacific R. R. Co. v. Wood, 24 Kan. 619; Ohio & Miss. R. R. Co. v. Fitch, 20 Ind. 498; McKinney v. Ohio & Miss. R. R. Co. 22 Ind. 99.

[4] Louisville, New Albany & C. R. R. Co. v. Cauble, 46 Ind. 277.

[5] Indiana, Act of March 4, 1863, (Sess. Acts, 1863, p. 25).

pointed by a federal court; but it was said that, so far as the statute affects persons and rights under the laws of that state, it authorizes the institution of a suit against a receiver appointed by and acting in the state, under a state court and a state law.[1] But a state court can not enforce its judgments out of funds in the hands of a receiver appointed by a federal court, even though the state statute prescribes the method of enforcing them against railroad property. In such a case the proper procedure is to apply to the federal court, whose officer the receiver is, for an order for the payment of the judgment.[2]

Section 728. **Of Actions Upon the Liability as a Common Carrier of Freight.**—Receivers of railroads are also liable in their official capacity, and to the same extent as the corporations whose roads they are operating, for damages arising from the negligence of themselves or their servants, or from delay, damage, etc., to freight committed to their care for transportation; in other words, they are accountable as common carriers of goods.[3] In these cases, as of course, leave to sue must be obtained from the court which made the appointment.[4]

The mere fact that receivers act under the appointment of the court of chancery can not be recognized as a defence to a suit for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on during the continuance of the receivership.[5] In Massachusetts it has been held that the liability of receivers appointed in other states for damage to freight, may be enforced against them in the courts of Massachusetts, upon the ground that they can not have greater exemption from responsibility in that state than is given them in the state where they were appointed.[6]

Section 729. **A Receiver Can Not be Held to the Specific Performance of a Contract.**—The specific performance of a contract made by a railroad company before the appointment of a receiver of its property, can not be compelled by a suit in equity against the receiver. Following this rule the supreme court of the United States has approved the action of the court below in dismissing, *sua sponte*, for want of equity, a bill brought by an express company to compel

[1] Ohio & Miss. R. R. Co. v. Fitch, 20 Ind. 498.

[2] Id.

[3] Cowdey v. Galveston, H. & H. R. R. Co. 98 U. S. 352.

[4] See the first subdivision of this chapter.

[5] Blumenthal v. Brainerd, 38 Vt. 402, 408.

[6] Paige v. Smith, 99 Mass. 395.

a receiver of a railroad specifically to perform a contract made with the railroad corporation before the receivership, by which the express company had the exclusive right to transact all the express business over the road for a given time, the contract creating no lien upon the road. Mr. Justice Swayne, delivering the opinion of the court, said: "A specific performance by the receiver would be a form of satisfaction or payment which he can not be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can be diverted." [1]

Section 730. **Of Actions for Taking Real Property Without Compensation—Rent of Leased Lines.**—If a railroad company constructs its road through the property of a private person without making compensation for the damage done, and afterward be placed in the hands of a receiver, the person damaged may maintain his action, leave of court being first obtained, against the receiver, to recover damages for his loss. In this, as in other cases of judgments against the receiver, the property in the receiver's possession will be subjected to the satisfaction of the judgment.[2] So also, if a railroad corporation before going into the hands of a receiver have leased other lines of road, and the order of appointment direct the receiver to pay the rentals therefor, he is considered to have assumed the obligation of paying them when he takes possession of and operates such leased line, and an action for the rent will lie against him, to be satisfied out of the funds of the estate. Having taken possession under such circumstances he can not question the validity of the lease.[3]

[1] Express Company v. Railroad Company, 99 U. S. 191, 200.

[2] Combs v. Smith, 78 Mo. 8.

[3] Woodruff v. Erie Ry. Co. 93 N. Y. 609.

CHAPTER XXI.

SALES BY RECEIVERS.

Section 731. Of the Authority to Make Sales — The Order — Appeal — Of Sales Generally.
732. The Order to Sell Can Not Generally be Attacked Collaterally.
733. The Manner and Terms of Sale may be Fixed by the Court.
734. The Execution of the Order—Confirmation of Sale—Purchaser's Title.
735. Existing Liens are Not Affected by the Sale.
736. The Receiver's Power to Execute Deeds.
737. Of Purchasers at the Sale.
738. Purchaser's Liability for Claims Arising out of the Receivership.

Section 731. **Of the Authority to Make Sales — The Order — Appeal — Of Sales Generally.** — One of the most important and responsible duties devolving upon a receiver is that of selling the property over which he is appointed. In some of the states his powers and duties in this respect are regulated by statute. In such a case he must, as must other trustees acting under statutes, comply strictly with the requirements of the law, both for the purpose of protecting himself and of transmitting a good title. It is not our purpose, however, to discuss questions arising under these statutes, since they are of local rather than general interest.[1]

Where the duties of receivers relating to sales are not regulated by statute, their authority to sell the property of the estate, or any part of it, is usually conferred by an order of court. The court may order a sale of the property in the hands of the receiver whenever it deems a sale necessary or advisable in order to protect the rights and interests of all parties.[2]

[1] It has been held in New Jersey, that a receiver under the act of that state, passed March 13, 1866, is vested with large discretionary powers as to the method of selling property, and that there is nothing in the act which interferes with liens that exist when the insolvency occurs, or which authorizes a receiver to sell the property otherwise than subject thereto. Potts v. New Jersey Arms, etc. Co. 3 N. J. Eq. 395, 516. The provisions of the "Act Respecting Executions" relating to proceedings supplementary to judgments in New Jersey, were intended to provide means for compelling satisfaction of judgments against natural persons, and claims against corporations are not within their contemplation; a sale, therefore, by a receiver appointed in such a proceeding passes no title as against a corporation. Conner v. Todd, 5 Cent. Rep. 61 (N. J. Ct. of Err. and App., 1866).

[2] Crane v. Ford, Hopk. Ch. 114, where such an order was made although the bill did not ask for a sale.

In making his application to the court for an order enabling him to sell, the receiver should show by proper evidence, to the satisfaction of the court, that the proposed sale is necessary and for the interest of the estate, and the order to sell should designate the particular property to be sold.[1] It should also direct the sale to be made in such a manner as is most likely to produce the best results. Accordingly, a direction by the court to the receiver of a large manufacturing business to sell, as a whole, the business and all the personal property belonging thereto, including raw material, finished products and all the debts due to the concern, was held erroneous, as not calculated to realize the most money or to be most advantageous to all the parties in interest.[2]

Where a receiver is directed, by an order of the court, to sell and to carry on the business until he can sell, he should sell at the earliest practicable moment.[3] In New York, in suits by creditors to reach lands conveyed in fraud of their rights, the decree should set aside the fraudulent conveyance, and permit the creditor to issue an execution and sell thereunder, or compel the debtor to convey to a receiver, and order the latter to sell.[4] Whether or not an appeal will lie from an order directing a sale by a receiver depends upon the practice in the several states. Under the practice in Michigan, where an appeal may be taken from some orders and not from others, it has been held that an order for the sale of assigned property by a receiver is final and appealable, where it provides for an entire disposal of the trust funds and may thus affect the claims of creditors and others, and, where also, it contains special and unusual provisions as to notice of sale and sale in large lots, and allows to some claimants, but denies to others interested, certain privileges of buying on credit, and allows sales without mortgage or other sufficient security.[5]

The sale by a receiver under order of the court is the act of the court, and no further action by it, as confirmance, seems to be necessary to consummate the sale; and this whether the sale be public or private.[6] A sale by a receiver is a judicial sale, and its specific performance may be ordered.[7]

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[1] Dixon v. Rutherford, 26 Ga. 149.

[2] Case v. Fish, 63 Wis. 475, 497. In South Carolina, under Rule 70 of the circuit court, a receiver should not be authorized to sell choses in action, unless they represent "desperate debts." Dilling v. Foster, 21 S. C. 335, 341.

[3] Hooper v. Winston, 24 Ill. 353.

[4] Van Wyck v. Baker, 10 Hun, 39. To the same effect is Union National Bank of Albany v. Warner, 12 Hun, 306, 309; Walker v. White, 36 Barb. 592, 598.

[5] First National Bank of Detroit v. E. T. Barnum Wire & Iron Works Co. 58 Mich. 315.

[6] *In re* Denison, 114 N. Y. 621.

[7] Id.

The indebtedness due a corporation which was placed in the hands of a receiver amounted to thirty-five thousand dollars and was scattered all over the country, so that not even a probable estimate of its value could be estimated. It was held that it was error to order the sale of such indebtedness, that the better and proper course was to direct the receiver to collect it.[1]

The sale of property to the sons of the receiver will not, alone, it has been said, be taken as evidence of bad faith.[2] A receiver's sale is absolute and removes the property from all process against the debtor owner.[3] The entire beneficial interest, with the power of disposition, passes to the receiver for the purpose of the trust, and he may convert the property into money for the general purposes contemplated.[4]

The person who deals with a receiver in his official capacity and makes purchases at a sale by him in such capacity and receives and retains certain goods, is estopped from denying that such person was a receiver, duly appointed and qualified.[5]

In a proceeding to dissolve a law firm an order directing the sale by temporary receiver of abstracts of title was held to be erroneous.[6]

Where a receiver collects money from a purchaser at a judicial sale before giving bond and fails to account, though he may afterwards give the bond, the purchaser may be compelled to pay the money a second time. It was said the purchaser was bound to see that he paid the money to the proper party. Here receiver had defaulted and left the state. It was said that he was not authorized to receive money before giving bond.[7]

Section 732. **The Order to Sell Can Not Generally be Attacked Collaterally.**— An order to sell property in the hands of a receiver, issued by the court having jurisdiction in the case, even though it be irregular and otherwise objectionable, can not be questioned or attacked in a merely collateral action; its irregularity or other defects should be reached by motion in the court from which it is issued, so that the court may have an opportunity of correcting its own errors, and a new and independent action will not be entertained to set aside such order and the sale made by virtue thereof.[8] But this decision was directly questioned by the court of appeals of New York which held, where the order had been obtained by the

[1] De Ford v. MacWatty, 35 At. R. (Md.) 488.
[2] Yetzer v. Applegate, 85 Io. 121.
[3] Watkins v. Minnesota Thrasher Manufacturing Co. 41 Minn. 150.
[4] Id.
[5] Hanke v. Blattner, 24 Ill. App. 394.
[6] Brush v. Jay, 113 N. Y. 482.
[7] Woods v. Ellis, 85 Va. 471.
[8] Libby v. Rosekrans, 55 Barb. 219.

receiver by means of a fraud upon the court, that the aggrieved party is not confined to a motion in the court which made the order, but may maintain an independent equitable action to set aside the order and the sale made under it.[1] As this ruling is, in terms, founded upon the well established principle that courts will set aside, as nullities, judgments, decrees or awards obtained by fraud, the rule as stated above may be taken as the prevailing one in all cases where the claim is made merely upon irregularities or other defects in the order of sale which do not amount to a fraud upon the court. This rule is especially applicable where the sale has been formally confirmed. Thus, in Wisconsin, where a sale of personal property by a receiver under an order of the circuit court of a county has been confirmed, its validity cannot be impeached in an action of replevin brought in another county, on account of the inadequacy of the receiver's bond, or because of his failure to comply strictly with the requirements of the order of sale, by a party to the action in which the property was sold as against a person claiming title under the sale.[2]

Section 733. **The Manner and Terms of Sale May be Fixed by the Court.**— It is common practice for the court, in making an order directing the receiver to sell the property of the estate, to specify the time when, and the manner in which the sale shall be made — as, e. g., that the property shall be sold as a whole or in parcels, for cash or upon deferred payments, and, if upon deferred payments, in what manner they shall be secured — such provisions being made in the order as are, in the opinion of the court, necessary or advisable to be adopted for the best interests of all concerned in the property. The court may hear suggestions upon these matters

[1] Hackley v. Draper, 60 N. Y. 88 (affirming s. c. 2 Hun, 253, also 4 Thomp. & C. 614), citing State of Michigan v. Phœnix Bank, 33 N. Y. 9, 27; Wright v. Miller, 8 N. Y. 9; Dobson v. Pearce, 12 N. Y. 156; Tiernan v. Wilson, 6 Johns. Ch. 411.

[2] Brande v. Bond, 63 Wis. 140; s. c. 23 N. W. Rep. 101. The court said, p. 142: "It is said the receiver never qualified by giving the requisite bond, and did not make the sale pursuant to the order of the court. But it is very clear that these objections can not be considered in a collateral suit. When the court confirmed the receiver's sale, it necessarily passed upon its regularity. It was the duty of the court then to ascertain whether the receiver had proceeded according to its order in making the sale or not. The order of confirmation was a direct adjudication of the regularity of the action of the receiver, and we can not now go behind the sale made by him. It certainly can not be impeached in this suit, but must be considered conclusive as to the title derived from the sale." See also Farmers' Loan and Trust Co. v. Central R. R. or Iowa, 17 Fed. Rep. 753; s. c. 5 McCrary, 421.

from the parties before it, or may appoint persons skilled in the particular business, or conversant with the property to be sold, to examine and report upon the best way to make the sale.[1] Thus, in a late case, where the receiver of an insolvent corporation had realized on all the assets except certain stocks, bonds and real estate which were for the time unmerchantable and if forced upon the market would be sacrificed, the court, of its own motion, in view of the desirability of closing the trust, directed the securities to be sold at public auction, after full notice to all persons interested, at an upset price and in proper lots or parcels to invite buyers.[2]

It has also been held, where the court directed a receiver to sell upon deferred payments, and the sale was so made by him, but without any any agreement on his part to put the purchaser into possession, that the application of the purchaser for an extension of time upon the deferred payments founded upon his inability to get possession on account of other litigation, may be refused, and that such refusal is not reviewable on appeal.[3]

In a recent case in New Jersey, it was held that a receiver was properly ordered to sell horses as perishable property, they being claimed to be included in the mortgage which was in process of foreclosure.[4]

Section 734. **The Execution of the Order — Confirmation of Sale — Purchaser's Title.** — The order of the court directing a receiver to sell property of the estate, should be executed by him in as strict compliance with its terms as is possible, but in as much as such sales, until they are fully executed, are subject to the action of the court by way of confirmation or rejection,[5] the receiver is usually permitted to exercise such discretion as is clearly for the benefit of the estate. In conformity with this practice receivers are not, like mere executive officers, bound to sell the property for the highest price offered, without regard to the purchaser or the use he

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[1] *In re* Newark Savings Institution, 9 Atl. Rep. 375 (N. J. Ch., May, 1887); Case v. Fish, 63 Wis. 475, the facts of which are stated *supra*.

[2] *In re* Newark Savings Institution, *supra*.

[3] Alvord v. Strickler, 14 Pac. Rep. 117 (Sup. Ct. Col. June, 1887).

[4] Howell v. Frances, 9 Atl. Rep. 397 (Ch. of N. J. 1887).

[5] Attorney-General v. Continental Life Ins. Co. 94 N. Y. 199. See also Simmons v. Wood, 45 How. Pr. 268, where a receiver, having been appointed on an *ex parte* order made late at night, sold the property at private sale early the next morning without notice to the parties interested, the sale was set aside and the appointment revoked as not in accordance with equitable principles.

will make of the property.[1] This discretion is frequently exercised by receivers in determining whether the property shall be sold as a whole or in parcels, since the advisability of adopting one method, or the other, depends largely upon the offers made and the condition of the property at the time the sale is to be made. Accordingly a court has refused to set aside a sale made by a receiver who exercised his discretion in this respect in good faith, although it differed with the receiver as to the wisdom of his action under the circumstances.[2]

A purchaser will be presumed to know that a sale by a receiver is made upon the condition that it may be approved or rejected by the court in its discretion.[3]

It has been declared that a sale by a receiver under order of court may be consummated without confirmance;[4] but the invariable practice in all jurisdictions is for the receiver to report the sale for confirmation, unless by order directing the sale such course is dispensed with.

Where there were two receivers and at the sale the property was purchased by a partnership in which one of them was interested, it was held that such fact was not evidence of bad faith, though the property sold for less than its value, and the sale was confirmed.[5]

In selling a patented article the court should specify the rights of the purchaser thereunder; and where the receiver failed to give notice of the rights to be acquired by the purchaser, the court refused to confirm the sale.[6]

A sale of either personal or real property by a receiver, under an order of the court, passes the legal title to the purchaser. No assignment of title to the receiver is necessary.[7]

Section 735. **Existing Liens are Not Affected by the Sale.**—Liens upon property held by a receiver are not divested by virtue of

[1] Knott v. Receivers, etc. 4 N. J. Eq. 423. In this case receivers of a canal company under a statute, advertised that they would receive proposals for a lease of the canal until a certain day, and it was held that this did not bind them to lease to the highest bidder before that day, or not to receive proposals afterwards.

[2] National Bank of the Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 170.

[3] Attorney-General v. Continental Life Ins. Co. 94 N. Y. 199, where the receiver, not knowing the value of certain assets, sold them at a totally inadequate price, and afterwards, having become aware of their value, refused to deliver them, and the court refused the application of the purchaser to compel the receiver to complete the sale.

[4] *In re* Denison, 114 N. Y. 621.

[5] Wagner v. Swift's Iron & Steel Works (Ky.), 26 S. W. R. 720.

[6] De Ford v. MacWatty (Md.), 83 At. R. 488.

[7] Russell v. Texas & Pacific Railway Co. 68 Tex. 646.

a sale made by him. If the order of sale make no mention of such prior liens, or of encumbrances of any kind, the sale passes the title to the property as it is in the receiver, and subject to whatever encumbrances or liens there may be existing upon it. A purchaser may, therefore, question either the validity of the liens or the amount due thereunder.[1] The receiver can sell only the interest which he has in the property, thus it has been held that the lien of a mortgage given by a firm to one who was not a party to an action, subsequently brought, in which a receiver was appointed over its affairs, can not be divested by a sale of the mortgaged property, made by the receiver by authority of the court.[2] So also, if the equity of redemption in mortgaged property be sold prior to the appointment of a receiver, and he allow the time provided by statute within which it may be redeemed, to pass without redeeming it, he has no title which can be the subject of sale.[3] In the same manner the lien of a judgment owned by a stranger to a suit in which a receiver is appointed over a partnership, against the individual interest in real estate of one member of the firm, remains upon the property notwithstanding it has been sold by the receiver.[4]

It has been decided that a sale by a receiver does not bar statutory liens established by judgments in state courts, where the petitions of the judgment creditors to intervene in the foreclosure proceedings in a federal court in which the receiver was appointed, have been denied without prejudice, although the judgments were obtained during the pendency of the foreclosure suit, while the receiver was in possession of the property, and without making him a party.[5]

A husband's real estate when sold by a receiver appointed in behalf of his judgment creditors, is sold subject to the wife's dower interest; and, in such a case, it is not proper to direct the receiver to pay to the wife her dower interest out of the proceeds.[6]

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[1] Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548. But in a case where a corporation, before going into the hands of receivers, assigned certain leases to a bank as security, and afterwards the receivers, under an order of court, sold all the property of the corporation free and clear of encumbrances, it was held that the assignment of the leases was a mere authority to collect and appropriate the rents due thereon, and that the rents which accrued after the sale belonged to the purchaser. Corrigan v. The Trenton Delaware Falls Co. 7 N. J. Eq. (3 Halst.) 489.

[2] Lorch v. Aultman, 75 Ind. 162.

[3] Fitch v. Wetherbee, 110 Ill. 475.

[4] Foster v. Barnes, 81 Pa. St. 377, where the title of one who bought at a sheriff's sale under such a judgment was sustained as against that of the purchaser at the receiver's sale.

[5] Blair v. Walker, 26 Fed. Rep. 78 (1886).

[6] Lowry v. Smith, 9 Hun, 514.

Section 736. **The Receiver's Power to Execute Deeds.** — It has been held by the supreme court of the United States that the authority conferred by the court upon the receiver to sell, carries with it the authority to give to the purchaser evidence of the transfer of title; and, while the contract of purchase is not binding upon a receiver until the sale is confirmed by the court, a deed executed by him before the confirmation, although undoubtedly irregular, is not void, but is only voidable. If the deed be executed after the confirmation it would take effect by relation, as of the day of sale, and if confirmation should be refused, a deed already executed would become inoperative. All objection, however, to a deed made before the confirmation of the sale is removed by the subsequent confirmation.[1] But in New York it has been considered that if the order authorizes a receiver to sell subject to the order of the court, it is necessary that the sale be reported to the court and confirmed after due notice to the parties to the action, before the receiver can properly make a transfer of the title. A transfer, in such a case, made before the confirmation, is not authorized, and the purchaser makes payment at his peril.[2]

Section 737. **Of Purchasers at the Sale.** — A sale by a receiver being a sale by an officer of the court and made under its supervision, there is no restriction upon any one from purchasing thereat, or from enforcing his rights under his purchase. Accordingly attorneys may purchase at such sales.[3] A receiver can not be a purchaser at a sale made by himself.

As in other judicial sales, he who purchases at a sale made by a receiver, is presumed to know that the receiver can sell only such interest in the property as is possessed by the parties to the action in which he is appointed; in other words, the doctrine of *caveat emptor* applies. He must ascertain for himself what that interest is, and also what the condition of the property is, because the rule applies not only to the title, but to the condition of the property.[4] So, it has been held, that a purchaser can not defend an action by the receiver for the purchase money, by pleading that the property was in bad condition when he purchased it, unless he was deceived

[1] Koontz v. Northern Bank, 16 Wall. 196, 201, citing to the point that a deed executed after the confirmation of the sale takes effect by relation as of the day of sale. Fuller v. Van Geesen, 4 Hill, 171.

[2] Simmons v. Wood, 45 How. Pr. 268.

[3] The law preventing attorneys from purchasing choses in action does not apply to sales by receivers. Mann v. Fairchild, 5 Barb. 108.

[4] Barron v. Mullin, 21 Minn. 374.

by fraud or misrepresentation.[1] It has been said that the purchaser of a note at a receiver's sale is not bound by the receiver's statement of the amount due, but is entitled to recover whatever may be due upon it.[2]

The court will, to the extent of its power, protect the property from being sacrificed through fraud or collusion on the part of bidders. Thus, in a case where some of the parties to the action, who had claims against the property in the hands of the receiver, unwarrantably interfered at a sale of such goods under the order of the court, and by pretended bids occasioned a loss to the fund arising therefrom, the amounts otherwise due to them on the general distribution were mulcted by the court, to protect other creditors from loss on account of their conduct.[3]

One who purchases, for new and ample consideration, part of the assets of a railroad company in the hands of a receiver, without knowledge or notice of the trust, is not liable to the creditors of the road for the value of the purchased property.[4]

Section 738. **Purchaser's Liability for Claims Arising Out of the Receivership.** — As we have already stated, existing liens upon property sold by a receiver under an order of court for that purpose, are not divested by the sale. A purchaser, therefore, takes property subject to the liens upon it.

Another class of claims which are frequently urged upon the courts as being properly payable by purchasers, are those arising out of the acts or negligence of the receiver or his agents, especially those for injuries to person or property occurring during the management of the property by the receivers. The court, in most instances, specifies, either in the order of sale or in that for confirmation, whether the sale is to be subject to these claims or not. Where the order for sale distinctly directs that the sale shall be subject to all the indebtedness incurred by the receiver, makes such indebtedness a first lien upon the property, and requires the purchasers to covenant to pay it, the purchasers are chargeable with a judgment recovered by administrators against the receiver for damages for the accidental killing of their intestate. The judgment creditor, in such

[1] Barron v. Mullin, *supra*, deciding also that, if the purchaser has consented to or acquiesced in the ratification of the sale, he can not defend against a suit for the purchase money, by the plea that another piece of real estate was included in the sale to him besides the one for which a deed was tendered.

[2] Newberry v. Trowbridge, 13 Mich. 263.

[3] Jaffrey v. Brown, 29 Fed. Rep. 476, 480 (1886).

[4] *Ex parte* Williams, 18 S. C. 299.

a case, may sue the purchaser to establish the judgment as a lien upon the property.[1] And where, in the order confirming a sale of a railroad by the receiver, it is provided that the purchaser shall pay the debts of the receiver and all claims or liabilities pending in the foreclosure suit, the court which made the order, still having jurisdiction of the cause, may entertain a petition against the purchaser for damages by one who has been injured while the property was operated by the receiver. If, in such case, the judgment recovered is made a lien upon the road by the statutes of the state, it may be made a lien upon it in the hands of the purchaser.[2]

It has been adjudged, however, that judgments against a receiver, recovered after he has settled his accounts, in a suit begun during his receivership, do not as against the purchaser create liens upon a railroad.[3]

The proceedings instituted against one who purchases a railroad at a receiver's sale subject to all liabilities arising out of the management and operation of the road by the receiver, for injuries occasioned by the negligence of the receiver's employes, should properly be at law.[4] A bill in equity will not be entertained in such a case, for the reason that a court of equity will not take jurisdiction of cases in which unliquidated damages arising in tort are sought to be recovered.[5]

Where railroad property in the hands of a receiver has been sold and the purchaser agrees to discharge all existing debts and liabilities of the receivership, it is the duty of the court to protect the purchaser against the demands which are not just and proper against the receiver, and to that end to require all such demands to be presented to it for the allowance. Where in such a case one brings an action in a state court against the purchaser to recover for damage to his property committed by the receiver, such demand being primarily chargeable to the fund in the hands of the federal court arising from the sale, the court will restrain the prosecution of the action, and require plaintiff to present his claim to it; for a judgment thereon in the state court would entitle him to satisfy it out of any property subject to levy in the hands of the purchaser.[6]

[1] Schmid v. New York, L. E. & W. R. R. Co. 32 Hun, 335. In this connection see also International & G. N. R. R. Co. v. Ormond, 62 Texas, 274; Hicks v. International & G. N. R. R. Co. 62 Texas, 38; Ryan v. Hayes, 62 Texas, 42.

[2] Farmers' Loan & Trust Co. v. Central Railroad, 17 Fed. Rep. 758; s. c. 5 McCrary, 421. See also Farmers' L. & T. Co. v. Central R. R. Co. 2 McCrary, 181.

[3] White v. Keokuk & D. M. Ry. Co. 2 N. W. Rep. 1016 (Iowa).

[4] Sloan v. Central Iowa R. R. Co. 62 Io. 728.

[5] Brown v. Wabash, St. Louis & Pacific Railway Co. 96 Ill. 297.

[6] Jessup v. Wabash, St. Louis & Pacific Railway Co. 44 Fed. R. 668.

"As a general rule, the purchaser of a railroad on a sale, made under an order of the court holding the custody of the property, by a receiver, takes the property free from claims against the receiver arising out of the road; but the court ordering the sale may impose upon the purchaser liability for such debts, as a part of the consideration of his purchase. A purchaser under such order can only be held liable according to its terms; and where the order was that the purchaser should take the property subject to the payment of such claims against the receiver as might be established before the court at any given time, for only such claims can the purchaser be held."[1]

[1] Houston & Texas Central Railroad Co. v. Crawford (Tex.), 31 S. W. R. 176; Crawford v. Houston & Texas Central Railway Co. 33 S. W. R. 534.

CHAPTER XXII.

OF INJUNCTIONS.

Section 739. Injunctions and Receiverships — Similarity and Difference of these Remedies.
740. They are Distinct Remedies.
741. Injunctions in Aid of Receivers — Against Unauthorized Suits.
742. Injunctions to Protect the Receiver's Possession.
743. Injunctions to Secure the Due Execution of Orders Upon the Receiver.
744. Injunctions in Aid of Judgment Debtors in Actions by Receivers.
745. Injunctions Against Receivers.

Section 739. **Injunctions and Receiverships — Similarity and Difference of These Remedies.**—While it is not our intention, in as much as it is not within the particular sphere of this treatise to consider fully the writ of injunction as a remedy in equity, the fact that it is so often granted in connection with the remedy by a receivership, and because it is employed in aid of the receivership, renders it proper to give the subject a brief notice at this place. The employment of these two remedies at the same time, in so many cases, arises out of the identity of the object to be attained, viz.: the preservation of property until justice can be done to adverse claimants by the court. They also resemble each other in that, while both are extraordinary remedies,[1] they are merely auxiliary to the main purpose of the action; the resort to them is not a final determination of the rights of the parties;[2] in neither case is the title to the property changed, nor are new liens created;[3] granting or refusing them is discretionary with the court;[4] both are subject to the general rules of equity, as, e. g., that neither remedy can be resorted to when adequate redress may be had in proceedings at

[1] In New York, under the code of civil procedure, both are made "provisional remedies." See McCarthy v. Peake, 18 How. Pr. 138; s. c. 9 Abb. Pr. 164.

[2] Leavitt v. Yates, 4 Edw. Ch. 134. 162; Great Western Ry. Co. v. Birmingham & Oxford Junction Ry. Co. 2 Phill. Ch. 597; *Ex parte* Walker, 25 Ala. 104; Hottenstein v. Conrad, 9 Kan. 435; Ellicott v. Warford, 4 Md. 80; Brown v. Northrop, 15 Abb. Pr. (N. S.) 383; Cooke v. Gwynn, 3 Atk. 689; Huguenin v. Baseley, 13 Ves. 105; Blakeney v. Dufaur, 15 Beav. 40.

[3] Ellis v. Boston, Hartford & Erie R. R. Co. 107 Mass. 1.

[4] Owen v. Homan, 4 H. L. Rep. 997, affirming s. c. 3 Mac. & G. 378; Mays v. Rose, Freem. (Miss.) 703; Whelpley

law,[1] and circumstances which will defeat an application for one remedy will frequently have the same result when the application is for the other.[2]

The principal difference between the remedies is that, while, by an injunction, a court merely forbids the continued perpetration of a wrong or the doing of a threatened unlawful act which may injure the property,[3] by a receivership it takes the property out of the hands of the party in possession and takes it into its own custody, thus preventing the continued wrong doing or threatened injury.

Section 740. **They are Distinct Remedies.**— While it often happens that courts grant an injunction and appoint a receiver in the same case and upon the same application, there is no connection, of necessity, between the two remedies. It lies in the discretion of the court to grant one remedy or the other, or both.[4] In some cases, however, it is greatly to the advantage of all parties in interest that an injunction should be granted, with the receivership, and there the granting of an injunction accompanies the appointment as of course.[5] In others the receivership is looked upon as a necessary incident of the injunction.[6]

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v. Erie Ry. Co. 6 Blatchf. 271; Hamburgh Manfg. Co. v. Edsall, 8 N. J. Eq. (4 Halst.) 141; Pullan v. Cincinnati & Chicago R. R. Co. 4 Biss. 47; and, see as to injunctions, United States v. Duluth, 1 Dill. 469; Reddall v. Bryan, 14 Md. 444; Haywood v. Cope, 25 Beav. 151.

[1] Wooden v. Wooden, 3 N. J. Eq. (2 Green.) 429; Akrill v. Selden, 1 Barb. 316; Sherman v. Clark, 4 Nev. 138; Mullen v. Jennings, 9 N. J. Eq. (1 Stock.) 192; Hart v. Marshall, 4 Minn. 294; Poage v. Bell, 3 Rand. (Va.) 586; Webster v. Couch, 6 Rand. (Va.) 619; Coughron v. Swift, 18 Ill. 414; Winkler v. Winkler, 40 Ill. 179; Sollory v. Leaver, L. R. 9 Eq, 22; Cremen v. Hawkes, 2 Jo. & Lat. 674; Parmley v. Tenth Ward Bank, 3 Edw. Ch. 395; Corey v. Long, 43 How. Pr. 497; s. c. 12 Abb. Pr. 427.

[2] As where the right to the remedy is lost by laches or continued acquiescence. *Cf.* Tapp v. Rankin, 9 Leigh. 478; Drewry v. Barnes, 3 Russ. 94; Skinner's Co. v. Irish Society, 1 Myl. & Cr. 162; Payne v. Paddock, Walk. (Mich.) 487; Jacox v. Clark, Id. 249; Wood v. Sutcliffe, 2 Sim. (N. S.) 163.

[3] Murdock's Case, 2 Bland. 461; Bosley v. Susquehanna Canal, 3 Bland. 63.

[4] Whitney v. Buckman, 26 Cal. 447; Rawnsley v. Trenton Mutual Life and Fire Ins. Co. 9 N. J, Eq. (1 Stock.) 347; Oakley v. Patterson Bank, 2 N. J. Eq. (1 Green.) 173; Nichols v. Perry Patent Arm Co. 11 N. J. Eq. (3 Stock.) 126.

[5] Seighortner v. Weissenborn, 20 N. J. Eq. (5 C. E. Green) 172; Morgan v. New York & Albany R. R. Co. 10 Paige, 290, where the officers of a railroad corporation were enjoined from disposing of or encumbering its property and from collecting demands due to it. See also Gravenstine's Appeal, 49 Pa. St. 310; Ruggles v. Southern Minn. R. R. Co. 17 Int. Rev. Rec. 29; Rose v. Bevan, 10 Md. 466; Miller v. Jones, 39 Ill. 54.

[6] Penn v. Whiteheads, 12 Gratt. 74; Merrell v. Pemberton, 62 Ga. 29, where it was held that an order reversing the appointment of a receiver effected also the reversal of the order of injunction. See also Dumville v. Ashbrooke, 3 Russ. 99; Dunn v. McNaught, 38 Ga. 179; Holden's Admr's v. McMakin, Par. Eq. Cas. 370; Maher v. Bull, 44 Ill. 97.

In New York, where these two remedies are of equal importance, being enumerated among the provisional remedies under the code, it has been held that, where an injunction is properly issued by a competent court, it is a bar to the appointment of a receiver in a later suit in another court, although between the same parties. But the decision rested upon the principle already elaborated, that one court will not interfere with the proceedings of another which has already acquired jurisdiction of the parties and the *res*.[1]

Section 741. **Injunctions in Aid of Receivers — Against Unauthorized Suits.**— As we have already seen, courts of equity are ever ready to protect their receivers and the property committed to their care, from the interference of strangers.[2] For this purpose they usually resort to proceedings in contempt, to a stay of proceedings, or to an injunction. The latter form of action has been frequently employed in England to prevent the receiver from being sued in other courts without the leave of the court whose officer he is, and also in order to compel the claimants, whenever such a course is advisable, to seek redress in its own tribunal by intervention in the original action, and thus to avoid a multiplicity of suits.[3] Even if the right of the party who claims property in the hands of a receiver be apparently incontestible, the court will restrain him from interference, for the reason that it can not permit its officer to be molested until the claimant's right has been adjudicated by a proper tribunal in appropriate proceedings.[4]

The same discretionary power is established and recognized in this country. Where a receiver of a national bank had obtained an order from a federal court in Vermont to sell certain bonds which had been pledged for a debt, that court took jurisdiction of a bill filed by him to enjoin a corporation of Vermont from prosecuting a suit instituted by it in the courts of Canada, for the recovery of the bonds, and issued a preliminary injunction according to the prayer of the bill.[5] In New York it has been held, however, that the application by a receiver for an injunction to restrain parties from

[1] McCarthy v. Peake, 9 Abb. Pr. 164; s. c. 18 How. Pr. 138.

[2] See the chapter on Title and Possession.

[3] Attorney-General v. St. Cross Hospital, 18 Beav. 601; Evelyn v. Lewis, 3 Hare, 472; Johnes v. Claughton, Jac. 573; Tink v. Rundle, 10 Beav. 318.

[4] Evelyn v. Lewis, 3 Hare, 472.

[5] Hendee v. Connecticut & P. R. R. Co. 26 Fed. Rep. 677; s. c. 23 Blatchf. 453 (1886.) It was also decided in this case that the jurisdiction of the court for this purpose was not taken away by section 4 of the Act of July 12, 1882 (22 U. S. Stat. at Large 162). See also Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792.

prosecuting a suit against him, upon the ground that the issues therein have been already adjudicated in other proceedings, will not be granted, for the reason that he may plead such adjudication in bar of the suit against him.[1] In Ireland, the courts have enjoined the prosecution of actions, in trespass and replevin, by tenants of premises belonging to the estate in the hands of a receiver, because of a distraint.[2]

Section 742. **Injunctions to Protect the Receiver's Possession.**—The writ of injunction is an effective instrument for the protection of the receiver in his possession of the property committed to his keeping. It is frequently employed for this purpose, and is granted to receivers with greater readiness than to ordinary suitors, because of their official character as representatives of the court. Thus its aid has been successfully invoked by a receiver to restrain a railroad corporation from condemning land for its use, without leave of the court which appointed him as receiver of the land, notwithstanding the fact that the company was proceeding under a statute which authorized the condemnation.[3] Likewise one who claimed a right of common in land belonging to an estate over which a receiver had been appointed, was enjoined from trespassing upon the land.[4] And where the right to collect wharfage was attached to property in the hands of a receiver, the court upon his application, enjoined the officers of an incorporated city from interfering with his possession by attempting to collect the wharfage dues.[5] So, also, the receiver of a railroad which is entitled to a certain grant of land from the state, may be awarded an injunction restraining the officers of the state from granting the same land to other parties.[6] And where an attempt was made to interfere with the possession of a receiver who was managing and operating a railroad, by divesting him of his control over its earnings and thus diverting them, the court resorted to an injunction to secure him in his rights, and restrained the prosecution of a suit in another state by means of which the interference was attempted.[7]

[1] Jay's Case, 6 Abb. Pr. 298.

[2] Parr v. Bell, 9 Ir. Eq. 55; *In re* Persse, 8 Ir. Eq. 111.

[3] Tink v. Rundle, 10 Beav. 318.

[4] Johnes v. Claughton, Jac. 573. In this case the right of common which was claimed had not been exercised for a number of years. The court granted leave to the claimant to be examined, *pro inter esse suo*, as to his right.

[5] Grant v. City of Davenport, 18 Iowa, 179.

[6] Davis v. Gray, 16 Walt. 203; s. c. 1 Woods, 420.

[7] Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792. The court, in this case, complying with the well-settled principles of equity and comity, did not attempt to enjoin the foreign court, but directed its writ

A receiver may have an injunction to restrain the commission of waste on land in his possession;[1] and if premises in the hands of a receiver are occupied by tenants under a lease containing a covenant against using them for specified purposes, the receiver may have them restrained by injunction from using them in violation of the covenant.[2]

Section 743. **Injunctions to Secure the Due Execution of Orders Upon the Receiver.**—A court of equity will also issue the writ of injunction for the purpose of securing a proper compliance by the receiver with its order directing him to pay out money, or securities in lieu thereof. So, in a case where a decree directed a receiver to pay certain claims out of money which might come into his hands, or out of securities, if the creditors were willing to receive them, it being evident from the circumstances of the case that the intention was that an administrator should decide upon the applicability of the assets before the receiver should apply them, and the receiver thereupon, without the authorization of the administrator, transferred certain securities to the agent of a creditor, who resided out of the jurisdiction of the court, an injunction was awarded against the agent to prevent him from remitting the securities to his principal, and thus to place them beyond the reach of the court, Marshall, Ch. J., said: "The injunction, which detains this subject within the power of the court, is not an alteration of the decree, but an order to insure the execution of the decree according to a sound construction of its import; an order to secure it from being violated under the semblance of being carried into execution."[3]

Section 744. **Injunctions in Aid of Judgment Debtors in Actions by Receivers.**—It sometimes happens that, after a receiver has brought suits or has obtained judgments in suits brought by him under the direction or by the permission of the court, technical

against the plaintiffs who were prosecuting the suit, and who were within its own jurisdiction. As to conflict of jurisdiction, see Parsons v. Charter Oak Life Ins. Co. 31 Fed. Rep. 305. (U. S. Circ. Ct. Iowa, June, 1887.)

[1] Mangle v. Lord Fingall, 1 Hog. 142. In this case, on account of urgency, the receiver was allowed, at the time he filed his bill and moved for the injunction, to move also for a reference to ascertain whether the proceeding was necessary and ought to be continued. In another Irish case the court issued a restraining order to prevent waste, upon the receiver's mere motion and without the filing of a bill. Cronin v. McCarthy, Flan. & Kel. 49.

[2] Mason v. Mason, Flan. & Kel. 429.

[3] Green v. Hanbury's Ex'rs, 2 Brock. 403, 419.

rights of action still remain against the same defendants upon the same causes of action, in favor of the corporation or person whose property the receiver holds, or in favor of the creditors of the estate. In such cases the court will protect the defendants from actions subsequent to those brought by the receiver, by enjoining their prosecution. In a case in which the receiver of a corporation brought a suit against its stockholders for the purpose of recovering from them the amount of dividends which had been declared and paid to them while the corporation was insolvent, and which were, therefore, illegal, the court granted to them an injunction restraining the creditors of the corporation from prosecuting actions of the same nature in their own behalf.[1]

On the other hand, the receiver himself may obtain an injunction against the creditors of the corporation whose assets he has, restraining them from instituting actions in their own interest against the shareholders of the corporation to recover unpaid subscriptions to the capital stock, he being vested with the right to sue therefor in the general interest of the estate.[2] So also if a receiver have joined with some of the creditors of the bank for which he is receiver, in an action to secure a statutory liability from the stockholders for the benefit of the fund in his hands, other creditors will be enjoined from prosecuting similar actions upon the same ground for their individual benefit.[3]

Section 745. **Injunctions Against Receivers.**—The writ of injunction is not, however, issued merely to protect the receiver in the possession of property in his custody, or to assist him in the performance of his duties by restraining others from interference; it has also been used to prevent the receiver himself from doing unlawful acts. It may be said, generally, that resort to this summary method of control of a receiver is not necessary nor is it usual, since the receiver, being an officer of the court appointing him, is always technically within its control and acting for it, and may be reached directly by an order of that court upon an application which may be made at any time.

In a leading case, where the receiver brought an unjust and vexatious action in the name of a third person who had not given him authority to use his name, and without the permission of the court which appointed him, the court upon the joint application of the

[1] Osgood v. Laytin, 8 Keyes, 521, affirming s. c. 48 Barb. 464.

[2] Calkins v. Atkinson, 2 Lans. 12; Rankine v. Elliott, 16 N. Y. 377.

[3] Eames v. Doris, 102 Ill. 350.

nominal plaintiff and the defendant, restrained the receiver from further continuing the action.[1] But if the receiver have been authorized or directed by the court which appointed him, to bring a suit, it will not interfere on behalf of the parties or others by injunction; in such a case it will require the aggrieved parties to make application directly for such relief as the circumstances may require.[2]

As in other cases in equity, an injunction against a receiver will be refused when it appears that the complaining party has had a full opportuntity to set up the grounds upon which he applies as a defence to an action, and has neglected to do so. Upon this principle, in a case where a receiver who was authorized by statute to collect from the shareholders unpaid subscriptions to stock, obtained a decree for a balance due on such a subscription, the court refused to restrain him from making the collection until after the amount of the debts of the corporation could be ascertained and the amount due from each shareholder determined, because these matters might have been set up in defence to the action, and could not be used in favor of the shareholders after decree.[3]

In an old English case it was held that a remainderman who was a tenant of real property in the hands of a receiver, had not a sufficient interest in the property to enable him to make a successful application to the court for an injunction against the receiver to restrain him from evicting him.[4] But where it is necessary fully or more surely to protect the rights of other parties, a court of equity will issue a writ of injunction against a receiver. Thus, in a case in New Jersey, in which an action at law for injuries had been commenced against a railroad which was in the hands of a receiver, and, upon demurrer, on the ground that the action should have been against the receiver, the court granted the plaintiff permission to amend by substituting the receiver as defendant upon condition that the consent of the chancellor should be obtained, and that the receiver should be barred from pleading the statute of limitations—the claim not being barred at the commencement of the action—the court of chancery, upon the application of the plaintiff, granted leave to substitute the receiver, and restrained him from pleading the statute of limitations.[5]

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[1] *In re* Merritt, 5 Paige, 125.

[2] Winfield v. Bacon, 24 Barb. 154.

[3] Pentz v. Hawley, 1 Barb. Ch. 122.

[4] Wynne v. Lord Newborough, 1 Ves. Jun. 164.

[5] Lehigh Coal & Navigation Co. v. Central R. R. Co. of N. J., 42 N. J. Eq. 591; s. c. 8 Atl. Rep. 648 (Ch. of N. J. 1887).

CHAPTER XXIII.

OF THE RECEIVER'S ACCOUNTS — EXPENSES OF THE RECEIVERSHIP — ALLOWANCES — PRESENTATION AND PAYMENT OF CLAIMS.

Section 746. Of the Duty of the Receiver to Keep and Render Proper Accounts — Time for Accounting — Final Account.
747. Of the Duty of the Receiver to Invest the Funds — When chargeable with Interest.
748. Of Calling a Receiver to Account.
749. The Practice Upon the Accounting — Reference of Accounts.
750. What Expenditures by the Receiver Will be Allowed upon the Accounting.
751. Generally of the Expenditures to be Allowed — Payment of.
752. Of Expenditures in Railway Receiverships.
753. Of Allowances for Legal Expenses — Counsel Fees.
754. When the Counsel Fees of Parties in Interest Will be Paid out of the Funds in the Hands of the Receiver.
755. Of the Allowance of Costs.
756. Of Penalties for Misconduct and Neglect.
757. When a Receiver May be Charged with Interest.
758. Of Appeals Herein.
759. Of the Presentment and Payment of Claims.

Section 746. **Of the Duty of the Receiver to Keep and Render Proper Accounts — Time of Accounting — Final Account.** — It is one of the principal duties of a receiver to make a full and complete inventory of all the property and effects which come into his hands, and to keep fair and accurate accounts of all moneys and funds received and paid out.[1] And it has been declared to be the duty of the solicitor who procures the appointment to give the receiver all the necessary directions as to making out the inventory, and, also, as to the proper method of keeping and rendering his periodical accounts.[2]

The assets should be kept wholly separate and distinct from his personal assets, the penalty for mixing the accounts being generally the charging of interest.[3] Thus where the receiver deposits money of the trust estate in a bank he must not make the deposit in his own name, or deposit the money with his own personal account, but

[1] Hooper v. Winston, 24 Ill. 353, 365. The account being rendered to the court by its officer, the receiver is not entitled to a jury upon the accounting. Akers v. Veal, 66 Ga. 302.

[2] In the Matter of Seaman, 2 Paige, 409.

[3] Utica Ins. Co. v. Lynch, 11 Paige, 520; *In re* Commonwealth Ins. Co. 32 Hun, 78: Hinckley v. Railroad Co. 100 U. S. 153.

should open a separate account, and, out of the abundance of caution, in a bank other than that in which he keeps his own account; and the deposits should uniformly be credited to him as receiver. So, also, it is held that a receiver of a railway system consisting of a number of roads united by lease or consolidation, each division being subject to separate mortgages, should keep separate accounts for each division of the road.[1]

Furthermore, it is the duty of the receiver to render his accounts to the court at regular intervals, and without being called upon to do so by the court or parties interested.[2] The regular practice is to render an account not less frequently than once a year.[3] In cases where there are minors interested in the funds in the hands of a receiver, there is an especial reason why he should be required to render his accounts promptly and without delay.[4] And it is a rule in the Irish chancery court that a minor, on attaining his majority, may call upon the receiver of his estate to account for the whole period of the receivership, notwithstanding that intermediate accounts have been rendered.[5]

In case of an irregularity as to the appointment, the receiver's account will be examined with exceptional strictness.[6]

A receiver may voluntarily render an account before the end of the receivership.[7] He may correct mistakes therein.[8] It is peculiarly the province of the chancery court appointing a receiver to adjust his accounts, and to it he must account.[9] But where it appears that the receiver never received any assets, and there is nothing for which he can account, he will not be required to render an accounting.[10]

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[1] Central Trust Co. v. Wabash, St. Louis, etc. R. R. Co. 28 Fed. Rep. 868. The reason assigned in this case was that such an arrangement would facilitate the ascertainment of the particular equities of each division *inter sese*.

[2] McBride v. Clarke, 1 Mol. 283; Adams v. Woods, 8 Cal. 306. *Cf.* Mabry v. Harrison, 44 Tex. 286.

[3] Day v. Croft, 6 Eng. L. & Eq. 62; Lowe v. Lowe, 1 Tenn. Ch. 515. *Cf.* Bertie v. Lord Abingdon, 8 Beav. 58. In this case a day in each year was set upon which the account, properly verified and showing the actual balance on hand, was to be brought in. This was done because such balance never clearly appeared and the receiver was required to pay the costs of the application. In New York, the accounting of receivers of corporations is fixed at six months by statute. N. Y. Laws of 1883, ch. 378, section 4.

[4] Dease v. Reilly, 4 Dr. & War. 284; s. c. 2 Con. & Law. 441. It seems that where all the parties are adults, they are competent to consent to a delay.

[5] Wildridge v. McKane, 2 Mol. 545.

[6] Corey v. Long, 12 Abb. Pr. (N. S.) 427.

[7] Bank Commissioners v. Franklin Institute for Savings, 11 R. I. 557.

[8] How v. Jones, 60 Io. 70.

[9] State to Use of Peterson v. Gibson, 21 Ark. 140.

[10] Lyons v. Atlanta Hill Gold Mining & Mill Co. 14 N. Y. S. 533.

Concerning the receiver's final accounting and report this has been said: "The proper practice * * * is for the court, after it has reached a conclusion, to order the receiver to account, on notice to all parties interested; and upon such accounting all questions can be settled, and the findings of fact and conclusions of law relating to such matter can be embodied in the decision of the court upon the merits of the action. * * * The final decree should settle what compensation the receiver is to have, what expenditures he shall be reimbursed for, how he shall be paid, whether out of the funds in his hands, or by one of the parties to the action."[1]

A receiver should present his accounts in such condition as to inform the parties interested so that they may judge of their correctness.[2] For all his charges against the trust fund the receiver should show satisfactory vouchers and proofs. He must take proper receipts from the persons to whom he makes payments. "The receiver is held to great strictness in respect of his accounts; and when he fails to produce vouchers for disbursements, a satisfactory reason for such failure should be given. * * * The vouchers should be filed with the account; and for such items as there are no vouchers, the receiver should file a verified statement showing to whom, for what and when such items were paid, and this verification should be positive; not merely upon belief."[3]

Section 747. **Of the Duty of the Receiver to Invest the Funds — When Chargeable With Interest.** — It is the duty of the receiver to make such use of the property that may come into his hands as to secure the largest revenue consistent with safety, and whenever the property can be rented or loaned so as to produce an income, this should be done.[4] Accordingly, if the receiver exercise his best judgment and act in good faith, he will not be liable for losses;[5] but if he invest the property in such a way as to secure to himself a personal benefit, he will be required to account therefor, and may even be charged interest.[6] And he is chargeable with interest upon the available funds of the estate, whether actually collected or not, if, by good management, they might have been

[1] Cutler v. Pollock (N. D.) 59 N. W. R. 1062.

[2] Hayden v. Chicago Title & Trust Co. 55 Ill. App. 241; American Trust & Savings Bank v. Frankenthal, Id. 400.

[3] Heffron v. Rice, 40 Ill. App. 244.

[4] Adair County v. Ownby, 75 Mo. 282.

[5] Hynes v. McDermott, 8 N. Y. St. Rep. 582.

[6] Battaile v. Fisher, 36 Miss. 321. The property in this case consisted of slaves, which the receiver employed in his own business, and he was held liable for their reasonable hire. See, also, Utica Ins. Co. v. Lynch, 11 Paige, 590.

collected.[1] Accordingly, a receiver who retains money in his own hands for his individual benefit, will be charged interest which will be computed with yearly rests;[2] but a receiver will not be chargeable with profits which incidentally accrue to him, as, e. g., where he is paid a commission for procuring a loan for certain mortgagors of a bank of which he is the receiver, the money so raised being used to cancel a debt owed to the bank.[3]

A receiver should not loan or in any way pay out the trust funds without direction from the court. He should advise the court as to the fund on hand, and ask for direction as to its keeping and disposition.[4]

Where a receiver was discharged for dereliction of duty, his compensation and all accounts not filed within the time prescribed were not allowed, and he was ordered to pay interest on all balances, if any, from time to time.[5] A receiver of a public trust, having a salary, is accountable for interest made on balances in his hands, notwithstanding prior accounts were settled without demanding such interest.[6]

Section 748. **Of Calling a Receiver to Account.** — According to the English practice the receiver is under the control of the master, and is required to pass his accounts before him,[7] and it seems that until the receiver has rendered at least one full account, any party to the proceeding may move for an accounting.[8] Where a receiver of rents was appointed in a suit against the vendor for specific performance of a contract of sale, upon the application of the purchaser and the bill was dismissed, the receiver was ordered to account upon a petition presented by the vendor.[9] But he will not be compelled to account and to exhibit his books to a party to the suit in which he was appointed. And an accounting can not be required until the rights of the parties have been finally passed upon, and the account is to be rendered to the court and not to the parties to the suit.[10] So, also, if any third person make an application that a re-

[1] Hooper v. Winston, 24 Ill. 353; Shaw v. Rhodes, 2 Russ. 539.

[2] Foster v. Foster, 2 Bro. C. C. 616.

[3] Special Bank Commissioners v. Franklin Institution, 11 R. I. 557.

[4] Schwartz v. Keystone Oil Co. 153 Pa. St. 288.

[5] *In re* Estate of St. George, 19 L. R. Ir. 566.

[6] Londsale v. Church, 3 Brown Ch. R. 41.

See section 757, as to when receiver is chargeable with interest.

[7] Bennet's Master, 98.

[8] Lowe v. Lowe, 1 Tenn. Ch. 515; Stretch v. Gowdey, 3 Id. 565.

[9] Pitt v. Bonner, 5 Sim. 577.

[10] Musgrove v. Nash, 3 Edw. Ch. 172, where the defendants in the suit in which the receiver was appointed prayed that moneys in his hands might be paid into court, and complained that he had not furnished them with statements of his accounts.

ceiver pass his accounts, the request will be refused.[1] But where the receiver became insane, the court directed that his surviving surety might pass the accounts and, the balance being paid into court, that the recognizance should be vacated.[2]

The court of chancery has, however, no jurisdiction to order, in a summary way, the executor of a deceased receiver to pass his accounts and pay over the balance.[3] But where the personal representative of a deceased receiver submitted to account for rents collected by the receiver, it was held that the court had jurisdiction to order him to pay over the balance due.[4] It is held in New York, that if, during the pendency of proceedings for an accounting instituted by the receiver of a corporation, one of the receivers die, the court may make an order reviving and continuing the accounting against his representatives, and directing them to come in upon such accounting and be bound by such orders and decrees as may be made.[5]

Where a receiver has rendered a report and it has been passed by the master, it can not be assailed in any other way than by a direct proceeding alleging error, fraud, mistake or the like.[6]

In England, it has been held that a receiver can not avail himself of the statute of limitations as to money due by him and not accounted for, even though his final accounts have been passed and his recognizance vacated, in as much as such sum becomes a debt of record, by reason of the recognizance, and the receiver becomes a trustee for the persons entitled thereto.[7] In New York, it is held that, where it is sought to review proceedings had upon a settlement of a receiver's accounts, upon the ground that claims allowed and paid out thereunder were fictitious and unfounded, the better proceeding by the creditor is to apply to be made a party to the suit in which the order was made, and to have the order vacated, because, in such a case, the court would have a wider discretion and greater power to grant relief than in an independent action.[8] But an order

[1] Colburn v. Cooper, 8 Ir. Eq. 510.

[2] Webb v. Cashel, 11 Ir. Eq. 558.

[3] Jenkins v. Briant, 7 Sim. 171. In such a case, the representative should petition to have the accounts passed, the bond discharged and a new receiver appointed. Smith on Receivers, 191.

[4] Magan v. Fallon, 5 Ir. Eq. 490. The form of the order made in this case is given in the report, *q. v.*

[5] In the matter of the Columbian Ins. Co. 30 Hun, 342; Matter of Foster, 7 Id. 129. *Quære*, whether such decrees would have the force of establishing claims against the estate or whether they would have to be settled in the regular course of administration.

[6] Farmers' Loan & Trust Co. v. Central R. R Co. 1 McCrary, 352; s. c. 2 Fed. Rep. 751.

[7] Seagram v. Tuck, L. R. 18 Ch. Div. 296.

[8] Schenck v. Ingraham, 5 Hun, 397; s. c. 4 Hun, 67. It was also held in this

of court requiring the receivers of a railroad which has been sold under a decree of foreclosure, to appear and account before a designated master, applies only to such accounts as have not been passed prior to the order, and does not require a re-examination of any accounts that have been settled.[1] And where the executors of a receiver apply to pass his accounts and to pay a balance into court, and it is so ordered, it will be well for them to do so forthwith, and not risk the chance of circumstances which may prevent them from complying with the order at a distant day.[2] But where a receiver appointed for the benefit of a tenant for life never acted, but permitted the solicitor in the cause to act as receiver and to collect all the rents, and after many years the executor of the receiver was compelled to pay into court the amount found to be due, notwithstanding that the solicitor had previously paid a portion to the tenant for life, it was held that the executor could not move for an accounting of what was paid, and for the enforcement of a lien upon the estate for the amount which should be found to be due upon the accounting.[3]

On a sale of property by the receiver to a firm of which he is manager he will not be required to account for profits made by the firm when it appears that the trust estate was benefited by the sale, that there were insufficient funds to ship the shingles to another market, and that the same vendee had previously purchased one-third of the product of the corporation.[4]

Section 749. **The Practice Upon the Accounting — Reference of Accounts—Payments Under.**—It is a general rule of practice in these, as in other suits which involve the examination of long accounts, that the matter shall be referred to a master or other officer; and this rule applies, indeed, with especial force to the settling of the accounts of a receiver. If the receiver apply for a referee to pass his accounts, he should first file a full and definite statement, verified by his oath, itemizing with particularity the various claims made by him, and the reference should relate

case that the fact that the creditor applying to intervene is entitled to participate in the fund in however small a degree, is sufficient to justify the application.

[1] Farmers' Loan & Trust Co. v. Central R. R. Co. 1 McCrary, 352; s. c. 2 Fed. Rep. 751.

[2] Gurden v. Babcock, 6 Beav. 157. Thus in 1812 the executors of a receiver applied to pass his accounts and to pay in the balance, and this was ordered, but payment was not made. In 1841, they were ordered to pay in the balance without interest, and it has held that they could not object upon the ground of the want of assets.

[3] Gurden v. Babcock, 6 Beav. 157.

[4] Chandler v. Cushing-Young Shingle Co. (Wash.), 42 Pac. R. 548.

specifically to the claims therein contained.[1] Under the New York statute relating to receivers of corporations,[2] it is held that creditors have a right to be notified of the accounting of the receiver, and to be present.[3] In regard to the conduct of the reference and the powers of the master or referee, some questions have arisen which are not as yet entirely settled. In England the report need not be confirmed by the court, and hence, exceptions can not be taken. Formerly the only recourse of a party aggrieved was to petition the court to review the questions of law arising thereunder, but upon such review, questions of fact involving the correctness of items could not be considered.[4] This rule, at an early day, found favor in New York where it was adopted by the court of chancery.[5] It is also the rule in the United States courts;[6] but not in Ireland, where the court will review particular items of the account;[7] nor, as it seems, in New Jersey.[8]

In jurisdictions where exceptions to the referee's report do not lie, the master or referee is deemed to act in a judicial rather than in a ministerial capacity.[9] A receiver having in his hands a fund to which there are two claimants, each of whom has commenced an action against him for the recovery of the same and has obtained

[1] People v. Columbia Car Spring Co. 12 Hun, 585. In this case, upon an appeal from an order directing a reference, the court, by Davis, P. J., said: "The petition of the receiver fails to show that he had filed or presented any account, as the established practice of the court requires. It states his claim in the most general and indefinite manner. The parties had no information of what he claimed to be entitled to, either for his compensation or his disbursements and expenses. It was his duty to have first filed his account or presented it with his petition, so that the parties against whom it is claimed might have had an opportunity to determine whether they were willing to consent to the same without the expense of a reference, and the court also might have had an opportunity, to pass upon the petition of the receiver with a better understanding of the nature and extent of his claim. To sustain the order as made would introduce a looseness of practice in such cases which might lead to great abuse." The order was, therefore, reversed without prejudice to a renewal of the motion.

[2] N. Y. Laws of 1883, chapter 378.

[3] Greason v. Goodwillie-Wyman Co. 38 Hun, 138. *Cf.* Metropolitan Trust Co. v. Tonawanda, etc. R. R. Co. 1 Ry. & Corp. L. J. 64.

[4] Shewell v. Jones, 2 Sim. & St. 170; s. c. affirmed, 3 Russ. 522; Cowper v. Earl Cowper, 2 P. Wm. 720 (1734).

[5] Brower v. Brower, 2 Edw. Ch. 631.

[6] Cowdrey v. Railroad Company, 1 Woods, 331; s. c. *sub nom.* Galveston Railroad v. Cowdrey, affirmed, 11 Wall. 459.

[7] Beytagh v. Concannon, 10 Ir. Eq. 351.

[8] Woolsey v. Cummings Car Works, 38 N. J. Eq. 432; Richards v. Morris Canal & Banking Co. 4 Id. 428; Mechanics' Bank of Philadelphia v. Bank of New Brunswick, 3 Id. 437.

[9] Cowdrey v. Railroad Company, 1 Woods, 331; s. c. affirmed, 11 Wall. 459.

an injunction restraining him from paying the fund to the other, may bring an action in the nature of a bill of interpleader, to compel the rival claimants to interplead and to settle their rights between themselves. In the meantime, he may proceed to render his accounts, and any money found in his hands may be paid into court, to abide the event of the litigation upon the interpleader.[1]

Where a receiver of the property of a railway company is appointed, pending a suit to foreclose a mortgage thereon, and the amount due on the mortgage has been ascertained, the railroad has a right to have the receiver discharged upon paying the amount found due; the fact that other parties claiming liens on the road which are disputed and relatively small, have had the receivership extended for their benefit, will not affect the power of the court to settle the accounts and discharge the receiver, but the company may be required to give security for the payment of such claims if established.[2] Where a manager was employed by the receiver of an insolvent railroad company, mainly to perform duties which the receiver himself should have attended to, and in a subsequent order for the disposition of the proceeds an amount was awarded to the receiver as compensation for his services, and he was directed to pay the manager a specified portion thereof, which he refused to do, claiming that the manager was indebted to him individually in a larger amount, it was held that the indebtedness from the manager to the receiver being admitted, a petition by the manager for an order compelling the receiver to pay him the amount specified, should be dismissed for want of equity.[3]

Where money is placed in the hands of a receiver pending the litigation, the court may, upon the decision of the cause, direct its application on motion ;[4] but the court can not do so where money has been paid over to the defendant in satisfaction of an execution, by order of the judge granting the injunction, according to the prayer of the bill, and if, in such a case, the injunction bond does not afford adequate protection to the party ultimately entitled, a suit in chancery where the rights of all the parties could be adjusted, would be the proper course.[5]

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[1] Winfield v. Bacon, 24 Barb. 154. *Cf.* Adams v. Woods, 8 Cal. 306.

[2] Milwaukee & Minnesota R. R. Co. v. Soutter, 2 Wall. 510, where the court held that the receiver, having been in possession a number of years, and not having accomplished the object of his appointment, the nature of property was such as to render it proper to discharge him.

[3] Gatzmer v. Philadelphia & Reading R. R. Co. 39 N. J. Eq. 363.

[4] Bank of Mobile v. Planters & Merchants' Bank, 1 Ala. 109.

[5] Bank of Mobile v. Planters & Merchants' Bank, 1 Ala. 109.

If objection be made to the receiver's account, or any of its items, and the account is long and complicated, the better and usual practice is to refer it, or the disputed items, to a master or referee, to take testimony and report his conclusions.[1] Notice of the reference and hearing must be given to the parties interested.[2]

The rule requiring the receiver to present vouchers and proof of expenditures is stated in a previous section.[3]

Section 750. **What Expenditures by the Receiver Will be Allowed Upon the Accounting.**— It may be stated generally that all the property which comes into the possession of the court through its receiver, together with all the rents, issues and profits arising therefrom, must be applied to the satisfaction of the decree after deducting taxes, insurance and other allowable charges.[4] This being the rule, the question arises what expenditures a receiver may lawfully make out of the fund with which he may be credited upon the accounting. The matter of expenditures is, in general, strictly regulated, and the first and most essential rule is that the receiver will not be credited with any payments which are not made by leave of the court by which he was appointed.[5] Various limitations have been engrafted upon this rule which operate to relieve it of some of its harshness, and which are the result of an effort to save the trust property the expense of repeated applications to the court for instructions. Accordingly a receiver may lawfully, under some conditions, make such use of the trust fund without leave of the court, as is necessary to preserve it, or to secure an income from it according to customary good usage, subject, however, to the supervision of the court. This relieves the receiver of personal liability where he expends small sums, or acts in good faith and for the best interests of the property in emergency involving expense, in order to prevent loss or damage.[6]

A receiver's charges in his account of expenditures must be reasonable, and what is reasonable under the circumstances is for the court to determine.[7] Thus a receiver has been permitted, without

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[1] Heffron v. Rice, 40 Ill. App. 244; Hayden v. Chicago Title & Trust Co. 55 Ill. App. 241; American Trust & Savings Bank v. Frankenthal, Id. 400.

[2] Id.

[3] Section 746

[4] Pepper v. Shepherd, 4 Mackey (D. C.) 269, 279.

[5] Hooper v. Winston, 24 Ill. 353.

[6] Blunt v. Clitherow, 6 Ves. 799; Hynes v. McDermott, 8 N. Y. St. Rep. 582. As to what will be held reasonable expenses in carrying on a business, see Flagg v. Metropolitan Ry. Co. 10 Fed. Rep. 413, per Blatchford, J.; s. c. 4 Am. & Eng. Corp. Cas. 140.

[7] Wells v. Wales, 31 Eng. Law & Eq. 562; Wastell v. Leslie, Id. 563 (n.)

leave of the court, to charge the funds with a reasonable premium of insurance paid for the protection of the property;[1] and also with the amount of an award paid to recover books necessary for him in conducting suits connected with the receivership,[2] and with amounts necessary to employ agents where the estate lay at a distance,[3] and with a reasonable compensation for assistants, clerks and watchmen where necessary.[4] And where the receiver was directed to apply the revenue from certain pieces of property to the repair and betterment of others, he was allowed sums laid out for what seemed to him necessary repairs.[5] But he can not employ a deputy receiver whose remuneration shall be paid out of the fund.[6] Accordingly, when the receiver has paid no money, but has made an arrangement with a deputy to receive such compensation as the court may allow, the contract should be reported to the court, and a blank left in the report for the sum that may be allowed.[7]

A receiver who pays claims against his predecessors is in no better condition than his predecessor with regard to them, and, therefore, if the predecessor were in arrears, he can not be allowed the credit.[8] A receiver is not entitled to reimbursement for the expenses of journeys to a foreign country, for the purpose of prosecuting proceedings before the tribunals of that country, for the recovery of property belonging to the estate, unless he had express authority from the court for such journey.[9]

Section 751. **Generally of the Expenditures to be Allowed—Payment Of.**—A receiver is a trustee, bound as such to the exercise of prudence and good faith in all his dealings with the trust estate. Allowance for expenses is not a matter of course, and the receiver's accounts should be carefully scrutinized by the chancellor. If there are unnecessary or extravagant expenditures they should be reduced or entirely rejected.[10]

The expenses attending the maintenance of the receiver's ap-

[1] Brown v. Hazelhurst, 54 Md. 26.

[2] Adams v. Woods, 15 Cal. 206.

[3] Blank v. Lindsey, 15 Ves. 91.

[4] Dickerson v. Van Tine, 1 Sandf. Super. Ct. 724; Taylor v. Sweet, 40 Mich. 736; Corey v. Long, 12 Abb. Pr. (N. S.) 427; Howes v. Davis, 4 Abb. Pr. 71.

[5] Hynes v. McDermott, 3 N. Y. State Rep. 582. This disbursement was subject, of course, to the allowance of the court.

[6] Corey v. Long, 12 Abb. Pr. (N. S.) 427. The question of employing counsel will be considered hereafter.

[7] Adams v. Woods, 15 Cal. 206. If the allowance be unsatisfactory, the aggrieved party may, of course, object by motion in the cause.

[8] Battaile v. Fisher, 36 Miss. 321.

[9] Malcolm v. O'Callaghan, 3 Myl. & Cr. 52.

[10] Schwartz v. Keystone Oil Co. 153 Pa. St. 283.

pointment are to be allowed.[1] A corporation appointed receiver is not entitled to the expense of an agent employed to perform its duties.[2]

It is a general principle that, when a trust fund is brought into court for administration and distribution, it must bear the expenses incurred in the proceedings, and they must be paid in preference to all other claims against it.[3] Where a receiver is appointed without cause the party moving for the appointment should be required to pay the expenses of the receivership.[4] It is sometimes the case that certain expenses should be paid by the successful party; such as he would have had to pay without a receiver.[5] If a receiver takes possession of and preserves property, the expenses in caring for it are a charge on it regardless of its ownership.[6]

Where a large number of vouchers was filed and the clerk charged for each one, instead of all as one filing, the charge was sustained by the chancellor, whose ruling the appellate court refused to disturb, saying that it did not show an abuse of discretion.[7]

Expenditures for assistance to the receiver, when shown to have been necessary, will be allowed to a reasonable amount.[8]

Fees of a referee are part of the costs of the receivership proceeding, and entitled to preference over any amount adjudged to be due the parties; and this though the receiver has incurred liabilities exceeding the available assets.[9]

Section 752. **Of Expenditures in Railway Receiverships.** — Owing to the peculiar nature of a railway receivership, many large amounts of money must constantly be disbursed by the receiver in operating the road and in keeping the property in repair. The rule upon this point in these cases, was declared by the supreme court of the United States in the case of Cowdrey v. The Railroad Company,[10]

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[1] Kimmerle v. Dowagiac Manufacturing Co. (Mich.) 63 N. W. R. 529. But not in a direct proceeding to discharge him. Hoffman v. Bank of Minot (N. D.), 61 N. W. R. 1031.

[2] Kimmerle v. Dowagiac Manufacturing Co. (Mich.) 63 N. W. R. 529.

[3] Petersburg Savings & Insurance Co. v. Della Torre, 70 Fed. R. 643.

[4] Myers v. Frankenthal, 55 Ill. App. 390 See further, section 119.

[5] Cutter v. Pollock (N. D.), 59 N. W. R. 1062.

[6] Heise v. Starr, 44 Ill. Ap. 406; Pennsylvania Co. v. Jacksonville, Tampa & Key West Railway Co. 13 U. S. C. C. A. 550.

[7] Pennsylvania Co. v. Jacksonville, Tampa & Key West Railway Co. 13 U. S. C. C. A. 550: s. c. 66 Fed. R. 421.

[8] Davis v. Stover, 16 Abb. Pr. (N. S.) 225.

[9] Crotty v. Jarvis, 20 N. Y. S. 728.

[10] 1 Woods, 331, 336; s. c. *sub nom.* Galveston Railroad v. Cowdrey, affirmed. 11 Wall. 459: International & Great Northern Railroad Co. v. Herndon (Tex. Civ. Ap.), 33 S. W. R. 877.

in the following language: "It may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation in his hands. His duties, and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. * * * And except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed."

Claims for the equipment of a railway in the hands of a receiver, and for supplies furnished on running account and under a continuous contract, are payable out of the net income in the receiver's hands.[1] In these cases the receiver states his accounts and submits them to the master for inspection, and herein the master acts in a judicial rather than a ministerial capacity. Exceptions to his report do not lie, but if he err the court may, on petition, refer the matter back to him for correction.[2] The action of receivers of railways in making expenditures is subject to review by the court.[3]

Section 753. **Of Allowances for Legal Expenses — Counsel Fees.**—A receiver is entitled to be repaid his disbursements in actions brought by or against him, when made in good faith;[4] and the costs of the proceeding in which the receiver is appointed have a priority over all other demands against the fund in his hands.[5] As a general proposition, it may be said that a receiver may retain counsel without leave of the court, and that the assets in his hands are liable for their fees, which first, however, must be allowed by the

[1] United States Trust Co. v. New York, West Shore & Buffalo R. R. Co. 25 Fed. Rep. 797; s. p. Burnham v. Bowen, 111 U. S. 776.

[2] Cowdrey v. Railroad Co. 1 Woods, 331, s. c. affirmed, 11 Wall. 459.

[3] International & Great Northern Railroad Co. v. Herndon (Tex. Civ. Ap.), 33 S. W. R. 377.

[4] How. v. Jones, 60 Iowa, 70; Howes v. Davis, 4 Abb. Pr. 71; Cowdrey v. Railroad Co. 1 Woods, 331, s. c. *sub nom*, Galveston Railroad v. Cowdrey, affirmed, 11 Wall. 459.

[5] Read v. Corcoran, 1 Ir. Ch. (N. S.), 235.

court.[1] But usually he should not retain the counsel of either party, especially where their interests conflict, because the receiver's counsel should be entirely disinterested in the matter; and where he does retain the counsel of either party, the court may refuse to credit him with their fees;[2] but where the interests do not conflict, or the parties consent to the retainer, the fees, if reasonable, should be allowed.[3]

It has, however, been held where a receiver, claiming authority under the state, retained counsel to oust the lessees of another receiver and succeeded in the suit, and afterwards by proceedings on appeal the property was sold, that the attorneys so employed are creditors of the receiver employing them, and that he may pay their fees out of any funds that came to his hands as receiver, and that upon so doing he is entitled to credit therefor on the settling of his accounts.[4] Where the receiver agreed to pay the attorney for his services in recovering a tract of land held adversely, a sum equal to one-half of the amount which might be recovered, and the suit was successful, and the land sold together with other property, it was held that the attorney was entitled to compensation out of the fund realized from the sale.[5] But where the attorney of the receiver applies to the court for an allowance for his services, claiming a specific sum, the court will not grant a larger amount even though it might have been reasonable to ask it.[6] And where the attorney retained was the partner of the receiver, and made the application upon his own petition verified by himself, without notice to any party concerned, it was held that the order might be assailed collaterally by any person sought to be affected by it.[7]

[1] *In re* Colvin, 4 Md. Ch. 126. *Contra*, Corey v. Long, 12 Abb. Pr. (N. S.) 427. Under the provisions of the New York statute (N. Y. laws of 1883, ch. 378, § 4), prohibiting a receiver from paying attorney's fees or allowances until they have been settled by the court, it has been held that the court may appoint a referee to determine whether the services have been rendered and whether the charges are just and proper. People v. Knickerbocker Life Ins. Co. 31 Hun, 622.

[2] Adams v. Woods, 8 Cal. 306.

[3] Hynes v. McDermott, 3 N. Y. St. Rep. 582; Smith v. New York Consolidated Stage Co. 18 Abb. Pr. 419; Bennett v. Chapin, 3 Sandf. Super. Ct. 673.

[4] State v. Edgefield & Kentucky R. R. Co. 4 Baxt. (Tenn.) 92, 98. See also s. c. 6 Lea. (Tenn.) 353, and *cf.* State of Tennessee v. McMinnville & Manchester R. R. Co. 6 Id. 369.

[5] Hand v. Savannah & Charleston R. R. Co. 21 S. C. 162, 182.

[6] Richter v. Schroder, 110 Ill. 112.

[7] In the Matter of the Commonwealth Fire Ins. Co. 32 Hun, 78. The court accordingly held that the orders so entered should not have been received in evidence on the reference to settle the receiver's accounts, for the purpose of establishing any right to the moneys directed to be paid by them.

So, also, where the receiver procures his appointment and secures the possession of the assets fraudulently, he is not entitled to his expenses in defending the appointment;[1] and a receiver, upon the passing of his accounts, is not entitled to an allowance out of a fund in his hands as receiver, for counsel fees which he has paid upon an unsuccessful defence to a suit brought against him by the owner of such fund, nor for the expenses of an unsuccessful appeal taken by him from the decree in that suit.[2]

An allowance of counsel fees for services rendered a receiver is made to the receiver and not to the counsel.[3] A receiver is permitted to retain counsel, and fees therefor are considered within the just allowances to be made by the court. The allowance of counsel fees involves only the question of reasonableness, and may be made though the receiver has not been previously authorized to employ counsel.[4] The court will fix the amount of the fee to be paid counsel; and the order of the court is *res adjudicata* as to the amount, so far as the receiver's liability is concerned. A suit against the receiver for an additional sum can not be maintained.[5]

Where a receiver has paid a fee to an attorney for services in collecting money due the estate, and such services are beneficial to the parties ultimately entitled to the fund, there is no reason why the fee should not be allowed.[6] A receiver was appointed of an insolvent corporation by a state court, and afterward the company was adjudged to be bankrupt. In litigation between the assignee in bankruptcy and the receiver over the possession of the property the latter employed counsel. In accounting to the assignee fees to the receiver's counsel for services in resisting the assignee were refused.[7] It was said that, under the bankrupt act, the right of the assignee to the property was paramount to that of the receiver, and that the services of the receiver's counsel were not for the protection of the estate, but hostile to it.

A receiver has no power to employ counsel to perform any duty other than a professional and skilled one.[8] It was said in the case cited that the custom of receivers employing counsel on the theory that they are to have all they can induce the court to pay, rather

[1] O'Mahoney v. Belmont, 62 N. Y. 183, where the order appointing the receiver was reversed on appeal.

[2] Utica Insurance Co. v. Lynch, 2 Barb. Ch. 573. It is to be noted that neither the defence nor the appeal in this case was maintained in the capacity of receiver, but merely as one of the defendants thereto.

[3] Stuart v. Boulware, 133 U. S. 78.

[4] Id. See section 274.

[5] Walsh v. Raymond, 58 Conn. 251.

[6] How v. Jones, 60 Io. 70.

[7] Platt v. Archer, 13 Blatchf. 351.

[8] Henry v. Henry (Ala.) 15 So. R. 916.

than for the best interests of the estate, and without the effort to obtain the best terms practicable, "is fraught with evil and should not be encouraged;" that the receiver should employ counsel and pay what is proper; but here the receiver had employed counsel and had not paid him and might never pay him, and, therefore, the allowance asked for attorney's fees should not be allowed.

The right of the receiver's counsel to charge the trust property with the amount of his fee does not arise merely from the contract with the receiver. When the counsel sues in another court to enforce the payment of his fee he must show that his charge has been approved by the court which appointed the receiver, or, at least, had been authorized by it. That a receiver may be sued in another court does not result in giving the latter court the power to determine matters within the discretion of the appointing court.[1]

The allowance to the receiver's attorney is a part of the taxable costs in the proceeding, and is to be paid in preference to the receiver's certificates[2] and the secured liens;[3] and if there be no surplus earnings, then out of the corpus of the property.[4] For services as counsel to the receiver in operating thirteen miles of railroad for about three years and a half, twenty-five hundred dollars were held to be an adequate allowance.[5]

It has been held that a motion for an allowance to the receiver's attorney is not to be heard and disposed of *ex parte*, but on notice after investigation and hearing.[6] The rule in the matter of payment of counsel fees is usually to allow him a certain sum each month, reserving the question of a further final allowance until the conclusion of the litigation, when the full amount of compensation to the receiver's counsel is fixed and allowed, after notice to all parties in interest.[7]

When the duties of the receiver's counsel are only of general consultation and advice, his compensation should be less than though he were prevented practicing generally.[8]

A receiver is not entitled to an allowance for services of counsel

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[1] International & Great Northern Railroad Co. v. Herndon (Tex. Civ. Ap.) 33 S. W. R. 377.

[2] Petersburg Savings & Insurance Co. v. Della Torre, 70 Fed. R. 643.

[3] Louisville, Evansville & St. Louis Railroad Co. v. Wilson, 138 U. S. 501.

[4] Id.

[5] Montgomery v. Petersburg Savings & Insurance Co. (U. S. C. C. Ap.), 70 Fed. R. 746.

[6] Merchants' Bank of St. Joseph v. Crysler, 14 U. S. C. C. Ap. 444; s. c. 67 Fed. R. 388. Allowance to attorney of $5,000 reversed.

[7] Id.

[8] Boston Safe Deposit & Trust Co. v. Chamberlain, 14 U. S. C. C. App. 363; s. c. 66 Fed. R. 847.

in preparing his bond, in procuring order on his successor to pay laborers employed by him, in sustaining his appointment, which is plaintiff's duty, and in searching for and taking possession of the trust property.[1]

Section 754. **When the Counsel Fees of Parties in Interest Will be Paid Out of the Fund in the Hands of the Receiver.**— Attempts have been repeatedly made to induce the court to make the counsel fees of all parties interested in a litigation over a specific fund which has been placed in the hands of a receiver, a charge upon that fund, thus introducing a practice similar to that in cases of partition and the settlement of decedent's estates. Special efforts have been made in this respect where the controversy involved the assets of an insolvent corporation. Frequently these endeavors have been successful at *nisi prius*, but the higher courts have, with scarcely an exception, refused to sanction such a practice. Thus it has been held, where the interests of the parties to a suit are adverse, that nothing beyond the legal taxable costs can be allowed to one party as against the other, and that extra counsel fees should not be made payable to an unsuccessful complainant out of a fund in court belonging to the defendant, except where the counsel has been employed to recover or create such fund for the joint benefit of all.[2]

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[1] Saulsbury v. Lady Ensley Coal, Iron & Railroad Co (Ala.), 20 So. R. 72. *Contra*, Kimmerle v. Dowagiac Manufacturing Co. (Mich.) 63 N. W. R. 529.

[2] Ryckman v. Parkins, 5 Paige, 543. *Acc.* Battaile v. Fisher, 36 Miss. 321. See the question of allowances exhaustively discussed in Attorney-General v. North American Life Ins. Co. 91 N. Y. 57, 59, wherein the court vigorously says: "We should perhaps treat them [the intervening policyholders] as having become in some regular manner parties to the action. The policyholders who thus introduced themselves into the litigation were represented * * * by at least four different attorneys. None of these policyholders were necessary parties to the suit. It might have run its course and ended in a final distribution, without the presence of any of them, and each was admitted as a party because he had his own individual and personal interest in the assets to be distributed, and solely that he might represent and protect that personal interest in the further proceedings * * * They filed exceptions [to the account] which were, in the main, aimed to reduce the receiver's compensation. * * * Quite an amount was thus saved to the policyholders in the sense that it was not required to be paid to the receiver. Nothing was added to the fund in the hands of the court. An improper payment out of it was prevented. This result benefited the respective intervenors. * * * Have, then, the petitioners any equity? * * * They were not necessary parties; they were permitted to intervene in behalf of their own personal rights; they brought no fund into court; * * * they came to partake of the distribution; they assailed the amount of the receiver's commissions: they pointed out where they were in

According to the better rule, it is not the proper practice for a receiver to make payments out of the funds in his hands as receiver, to the counsel for any of the parties interested therein, and credits therefor should not be allowed. But if he have in his possession funds to which the particular clients are entitled, he may be reimbursed if the payments were reasonable, or were made at the request of the client.[1]

It has recently been held that the attorneys for the minority of the stockholders of an insolvent corporation, who had filed a bill for an injunction, receiver and sale, upon the ground of fraud and confederacy on the part of the defendants — a majority of the stockholders — were not entitled to have their fees allowed out of the proceeds of a sale made by a receiver appointed according to the prayer of the bill.[2]

Where certain creditors of an insolvent insurance company had obtained permission to intervene in proceedings instituted by the receiver, and to have notice of such proceedings and to make motions therein, it was held that the court could not grant any allowance to the counsel which should be payable out of the fund in the receiver's hands, nor could it make their taxable costs a charge thereupon;[3] nor has the attorney retained by policyholders to resist improper claims made by a receiver of an insolvent insurance company against the assets in his hands, any legal claim to compensation by the receiver out of the assets;[4] nor will allowances be made to counsel for presenting claims against the funds in the hands

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excess; they helped the court with ability and zeal in a just determination of that amount. * * * The precise doctrine which we are asked to declare, * * * assumes that the court would have gone wrong but for the good advice it got. We reject it. * * * We repeat that we are not aware of any rule or principle whereby any of these parties are entitled to call upon others to pay counsel fees which they incur in their own behalf for the protection of their personal interest."

[1] Drake v. Thyng, 37 Ark. 228,

[2] Hubbard v. Camperdoun Mills, 1 S. E. Rep. 5 (Sup. Ct. of S. C. 1886). It was further held in this case that the fact that the defendants consented to the appointment of the receiver did not make the plaintiff's attorneys their attorneys, and that the corporation was a necessary party to the action and could retain counsel who should be paid out of the funds in the receiver's hands.

[3] Attorney-General v. Continental Life Ins. Co. 27 Hun, 195, where the court held it unjust to determine the fees without giving the clients an opportunity to be heard. S. P. Attorney-General v. North American Life Ins. Co. 91 N. Y. 57.

[4] Attorney-General v. Continental Life Ins. Co. 31 Hun, 628, where the court held that the services were rendered for the benefit of the clients, and not for, nor on behalf of, nor by the employment of the receiver, and, therefore, created no indebtedness against him.

of the receiver, where the claims are rejected and the order reviewed and affirmed on appeal, upon the theory that such proceedings tend neither to protect nor to increase the fund in the hands of the receiver.[1]

Where a creditor's bill was filed against several debtors, and their property came into the custody of the court, and, subsequently, they were adjudged bankrupts in the United States district court, the trustees in bankruptcy filing a petition to obtain possession of their assets, and an order was granted that the fund in the hands of the receiver, except so much as was necessary to defray the costs and expenses of collection and of securing it until the granting of the order of surrender, should be paid into the hands of the trustee, it was held to be necessary to show specifically that a given claim came within the exceptions before it would be paid out of the fund, and that these exceptions included the proper and necessary expenses of filing the bill and collecting the assets by the receiver, including counsel fees from the time of the filing of the bill to the time the assets were demanded by the trustees in bankruptcy, and including the services of the receiver and his counsel up to the time of ordering the surrender of the fund.[2]

Where an attorney was employed by an individual to bring a suit or to conduct proceedings against an insolvent insurance company whose assets had been placed in the hands of a receiver, the proceedings having for their purpose the protection of the general fund and assets of the company and their concentration in such shape and under such control as should be for the benefit of all the policyholders and others concerned, it was held that the court had power to order payment for the services to be made out of the fund in the hands of the receiver, upon the ground that those who receive the benefit of labor ought to pay for it, and that, when the protection of a trust fund requires representative proceedings, such proceedings when necessary and proper, should be encouraged, and further, because the court, as administrator of the trust, ought to have power to decree compensation in a proper case.[3]

[1] People v. Security Life Ins. and Ann. Co. 23 Hun, 596. The counsel in this case cited forty *nisi prius* orders as precedents for the application.

[2] Seligman v. Saussy, 60 Ga. 20, 25.

[3] Attorney-General v. Continental Life Ins. Co. 62 How. Pr. 130; s. c. 88 N. Y. 571, where it was held that allowances to compensate special counsel employed by the attorney-general in proceedings to wind up the affairs of the company, should not be made out of the funds in the receiver's hands. But the receivers of an insolvent corporation were allowed the costs of resisting, in good faith, a claim of set-off by a debtor of the corporation, although the set-off was finally allowed by the court. Holbrook v. Receivers of American Fire Ins. Co. 6 Paige, 220.

An Ohio court has correctly said: "If what is done in bringing the fund into court has been beneficial to the parties entitled to it on distribution, under well-settled principles of law an allowance should be made to the attorney of the plaintiff through whose efforts the fund was brought into court."[1] Concerning the payment out of the trust fund of the attorney of the plaintiff for services in bringing the fund into court, the federal court has said: "It is a general principle that when a trust fund is brought into court for administration and distribution, it must bear the expense incurred in proper proceedings taken for the purpose. That expense necessarily includes reasonable counsel fees. The counsel not only represents the complainant who employs him to represent his interests in the suit, but he incidentally represents all others having a common and like interest in the suit and in the fund brought by it into court, who may avail themselves of the services and share in the benefits."[2]

The rule announced is founded on the benefit and protection given the trust property by the plaintiff's counsel, and the advantage and benefit which all persons interested receive thereby.

The attorney of a trust company will not be allowed any fee in a suit by it to collect rent from a receiver; because such services are exclusively for the benefit of the company.[3]

An attorney is not entitled to any fee from the receiver for services rendered the corporation placed in his hands after the appointment; but for services rendered the company in resisting the appointment of the receiver prior to the appointment, the attorney of plaintiff is entitled to compensation out of the trust property.[4] Concerning this subject the New York court of appeals has but recently said: "The court of primary jurisdiction, in the exercise of its discretion, may authorize the receiver of an insolvent corporation, appointed in an action brought for its dissolution, which was defended in good faith by the corporation, though unsuccessfully, to pay, as a preferred claim out of the funds in his hands, a reasonable sum for the compensation of counsel employed by the corporation in defending the action. The principle upon which an allowance in such case may be made is that counsel fees are in the nature of expenses incurred by the corporation and its trustees in the protection and preservation of the trust which they represent, and even

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[1] Payne v. McNamara, 9 C. C. R. (Ohio) 132, citing Trustees v. Greenough, 105 U. S. 527; Olds v. Tucker, 35 Ohio St. 581.

[2] Petersburg Savings & Insurance Co. v. Della Torre, 70 Fed. R. 643.

[3] Central Trust Co. v. Valley River Railway Co. 55 Fed. R. 903.

[4] Barnes v. Newcomb, 89 N. Y. 108.

if it turns out that a case is made for the interference of the state, so long as the defence was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees to take all reasonable means for its protection. But in such case it is in the discretion of the court, in view of all the circumstances, to determine whether any or what allowance shall be made."[1]

But no fee is to be allowed counsel for intervenors, because the proceedings by them are by individuals for the protection of their own interests;[2] nor to counsel for policyholders for resisting the payment of assessments made by a receiver.[3]

Section 755. **Of the Allowance of Costs.**— According to the English practice, the receiver is not justified in defending an action brought against him unless he first obtain leave of court; hence, if a defence be prosecuted without leave, and be unsuccessful, he is not entitled to be credited with the costs.[4] If the receiver neglect to pay proper demands when they fall due, and, on account of his neglect, actions are instituted against him for their collection, he will be personally liable;[5] but if a judgment for costs be recovered against a receiver which he delays to pay, although he have sufficient funds, and the assets are thereafter paid out on other demands, he will not be required to pay the judgment out of his individual assets.[6] And where a receiver commences proceedings at law and then, under advice of counsel, abandons them and proceeds in another form, and is successful in the second proceeding, it seems that he will not be allowed the costs of the first proceeding.[7] But a receiver will not be charged the costs of an accounting because some items of credit are not allowed, no fraud or bad faith being shown.[8]

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[1] People v. Commercial Alliance Life Insurance Co. (Feb. 25th, 1896), 12 Natl. Cor. R. 86.

[2] Attorney-General v. North American Life Insurance Co. 91 N. Y. 57.

[3] Commonwealth v. Mechanics' Mutual Fire Insurance Co. 122 Mass. 421.

[4] Bristowe v. Needham, 2 Phil. Ch. 190; Swaby v. Dickon, 5 Sim. 629. In the latter case the receiver was appointed over the estate of an infant, and the action was instituted for damages on account of a distress which he had caused to issue.

[5] Cook v. Sharman, 8 Ir. Eq. 515.

[6] Devendorf v. Dickson, 21 How. Pr. 275. In New York the receiver is not liable for costs unless so directed by the court because of bad faith or mismanagement. Marsh v. Hussey, 4 Bosw. 614.

[7] *In re* Montgomery, 1 Mol. 419.

[8] Hynes v. McDermott, 3 N. Y. St. Rep. 582, 586 (1886); Radford v. Folsom, 55 Iowa, 276.

In England a receiver has been allowed to take out of the fund in his hands the costs adjudged to him against an unsuccessful plaintiff, the latter being irresponsible.[1] Where a motion is made to remove a receiver which is subsequently withdrawn, and the receiver then surrenders his trust, the court will allow him the expenses of the defence if he have acted in good faith;[2] but the rule would be otherwise if the motion were prosecuted successfully.[3] So, also, the receiver is not chargeable with costs where he is discharged because of his inability to secure new sureties;[4] but when a receivership is extended over additional lands, the receiver must perfect additional security, or be removed. If, in such a case, he be removed and seek the costs incident to his original appointment, he must make a special case for them.[5]

According to the English practice, it seems to be the duty of the parties to the proceeding to see to the taxation and payment of costs due a receiver, but if they neglect to do so the receiver may attend to it.[6] Where receivers prosecute actions for the collection of alleged money demands, instituted or carried on for the enhancement of the fund and for the benefit of those to whom it is ultimately to be paid, and the action results favorably for the defendant, they are entitled to costs to be paid immediately, and should not be required to take only a distributive share upon a settlement of the accounts.[7]

A special receiver appointed during vacation should be allowed, out of the moneys collected by him during such receivership, an amount sufficient to compensate him for all costs and other legitimate expenses which he may have incurred while acting as such special receiver.[8] But fees of the referee upon an accounting can not be determined against the receiver without hearing him. Thus, where a reference was ordered, upon a receiver's petition for the purpose of determining his commissions, and a report was made on which no action was taken, and subsequently the referee made a motion to have his fee determined and paid over, the court, upon appeal, refused to allow them, the receiver not having been notified.[9]

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[1] Courand v. Hamner, 9 Beav. 8.

[2] Cowdrey v. Railroad Company, 1 Woods, 331. A contrary rule prevails in England, upon the ground that the receiver need not have appeared and is not a party interested. Herman v. Dunbar, 23 Beav. 312.

[3] *In re* Colvin, 4 Md. Ch. 126.

[4] Lane v. Townsend, 2 Ir. Ch. (N. S.) 120.

[5] Wise v. Ashe, 1 Ir. Eq. 210.

[6] Ireland v. Eade, 7 Beav. 55.

[7] Columbian Ins. Co. v. Stevens, 37 N. Y. 536.

[8] Kerr v. Hill, 27 W. Va. 577, 616.

[9] Attorney-General v. Continental Life Ins. Co. 27 Hun, 524.

Fees paid by a receiver to his attorney for professional services and advice in regard to the management of the property in his hands, are part of the costs of administration and are not taxable as costs against the losing party in the litigation.[1] And upon the final settlement of the accounts of the receivers of an insolvent corporation, the court may refuse to inquire into and reduce the master's taxed bill of fees for services in the case, if it have been paid by the receivers.[2]

Section 756. **Of Penalties for Misconduct and Neglect.**—A receiver being an officer of the court, and also occupying a fiduciary position, ought to perform his duties with scrupulous attention to regularity and good faith, and should promptly obey every order of the court affecting himself or the property committed to his care. It is on account of this obligation that a receiver will be charged penalties for misconduct or neglect. Accordingly, the English court of chancery formerly had a rule requiring receivers to pass their accounts annually, and in default thereof to forfeit their salary and to pay interest on the balances in their hands.[3] But a receiver has been allowed his commissions where there was a delay in order to collect more rent,[4] or where the receiver was requested to delay by the parties on account of a pending compromise.[5] If the receiver act in good faith and be ready to explain his accounts, the fact that he is unskillful in bookkeeping and, in consequence, has gotten his affairs as receiver into some confusion, ought not to be visited with a penalty.[6] But where a receiver, upon his discharge, neglected to pay the balance in his hands into court, he was required to pay, in addition thereto, the amount of his compensation and also interest from the date when the payment ought to have been made.[7]

Section 757. **When a Receiver May be Charged with Interest.**—The receiver is personally liable for interest in two classes of cases: (*a*) when he has funds in his hands on which he could, by proper management, have collected interest—a matter which has already been considered; (*b*) when he is charged interest as a penalty for neglect or misconduct.

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[1] City of St. Louis v. St. Louis Gas Light Co. 87 Mo. 224 (1886); s. c. 11 Mo. App. 248.

[2] Matter of Bank of Niagara, 6 Paige, 213.

[3] General Order, 15 Ves. 278; Potts v. Leighton, Id. 273.

[4] Flood v. Lord Aldborough, 18 Ir. Eq. 103.

[5] Purcell v. Woodley, 10 Ir. Eq. 422; s. p. Dease v. Reilly, 2 Con. & Law. 341; s. c. 4 Dr. & War. 284.

[6] Cowdrey v. Railroad Company, 1 Woods, 331; s. c. 11 Wall. 459.

[7] Harrison v. Boydell, 6 Sim. 211.

It being the duty of the receiver to keep the funds in his hands as receiver separate from his private funds, he will be charged interest where he mixes the two funds in a common account and makes use thereof as his own;[1] and where he derives a personal benefit from the mixing of the funds, being enabled thereby to draw checks against it on his own account, he is properly charged with interest.[2] But the rule is otherwise if it do not appear that he has used the funds belonging to him as receiver improperly or made any profit thereupon.[3] And where it appears that the receiver deposited money collected by him in one bank to his account as receiver, and that most of it was drawn out on his check and deposited in another bank to his private account, and when examined as a witness by the master to whom the court had referred his accounts he refused to explain the transaction or to state what sums he had so deposited, it was held that a charge made against him for the use of the money held by him as receiver was enforceable.[4]

If receivers illegally appropriate to their own use a balance, they will be charged interest thereon, and if one only makes the misappropriation but the others are responsible for it on account of their negligence, they may be jointly liable therefor.[5] In as much as a receiver ought to be constantly ready with his accounts, any neglect in this respect is a ground for charging interest;[6] and if he withholds funds after they should be paid over, interest is properly imposed as a penalty.[7] But where the receiver makes unauthorized loans, upon which he receives interest with which he charges himself, and no losses occur, he will not be charged more than he actually receives, it appearing that he acted in good faith.[8] So, also, interest will not be charged unless the propriety of so doing be clearly shown;[9] and when charged it dates only from the time of the neglect or misconduct on account of which it is imposed.[10]

Section 758. **Of Appeals Herein.**— As a rule, the receiver, being a mere custodian of the funds, is not affected by an order of court in reference to the disposition thereof. But where the order directs

[1] Utica Ins. Co. v. Lynch, 11 Paige, 520.

[2] Matter of Commonwealth Ins. Co. 32 Hun, 78.

[3] Radford v. Folsom, 55 Io. 276.

[4] Hinckley v. Railroad Company, 106 U. S. 153, 157.

[5] Commonwealth v. Eagle Fire Ins. Co. 14 Allen, 344.

[6] Pearse v. Green, 1 Jac. & W. 135; Fletcher v. Dodd, 1 Ves. Jr. 85; Potts v. Leighton, 15 Ves. 273; Blank v. Jolland, 8 Id. 72.

[7] Harman v. Foster, 1 Hog. 318; Fetnam v. Kirby, 4 Ir. Eq. 320.

[8] Attorney-General v. North American Life Ins. Co. 89 N. Y. 94.

[9] Howe v. Jones, 60 Io. 70.

[10] Potts v. Leighton, 15 Ves. 273; Fetnam v. Kirby, 4 Ir. Eq. 320.

the payment or delivery of specific amounts of money or property, in as much as such an order may direct the payment or delivery of funds or property of which the receiver has not the possession, and may involve the question of the propriety by him, or may impose a personal liability, it is held that the receiver may properly appeal from such orders.[1] Thus, where a receiver claimed that a surplus remaining after satisfying all claims, belonged to him by virtue of an assignment, but the court refused to try his right and ordered him to pay it into court, it was held, upon appeal, that such a ruling was erroneous and that the claim should have been regularly passed upon.[2] So, also, any of the parties interested in the settlement of the accounts, if they consider themselves aggrieved, may appeal[3].

Section 759. **Of the Presentment and Payment of Claims.**— It is the rule of practice in receivership proceedings to require, by order of court, the presentment of all claims against the trust estate within a prescribed time, that they may be proved and allowed or rejected. The claims to which reference is had are those due by the debtor defendant, and which are entitled to payment as of course in the settlement of the affairs of the defendant and disposition of the assets. They are usually, if not always, claims against partnerships or corporations. The presentation of claims may also attend receivership proceedings involving estates of decedents or assignments.

After the time limited for the presentation of claims, they may, under a proper showing, be admitted and heard. By limiting the time for the presentation of claims no creditor "obtains a vested right to a certain dividend to the exclusion of others. If a reasonable excuse for delaying to make an earlier claim is shown, the creditor will be admitted at any time before actual distribution, even after partial payments, if there be surplus in the hands of

[1] Howe v Jones, 60 Io. 70; Hinckley v. Gilman, Clinton & Springfield R. R. Co. 94 U. S. 467.

[2] Adair County v. Ownby, 75 Mo. 282.

[3] Hovey v. McDonald, 100 U. S. 150; Adams v. Woods, 15 Cal. 206. In the first of these cases there were two contestants for the same fund, and various suits were pending in reference thereto. In one a decree was made directing payment to a particular party, and the court, on the application of the receiver, directed him to carry out the decree. In the other suit an appeal was pending and the judgment was subsequently reversed and an order entered that the fund be paid into court; the receiver failed to do this and was adjudged in contempt and ordered to account; the auditor, on the accounting, rendered a report in favor of the receiver, which was confirmed, and an appeal being taken, the receiver moving to dismiss, but the court, while it upheld the right to appeal, affirmed the decree.

the receiver, so as not to interfere with the payments already made." [1]

Where one permitted eight years to pass without presenting and pressing his claim, it was refused. Here the order was that all claims should be presented in four months or be barred from participating in the funds.[2] The time prescribed for the presentation of claims may be extended, and in so doing the court exercises a discretion that is not reviewable on appeal.[3] It is proper, on petition of a creditor, for the court to permit him to prove his claim at any time while the fund, or any part of it, is under the control of the court, notwithstanding the limited time for the presentation of claims has expired.[4]

The following announcement of the New York court of appeals, in which state the time for the presentation of claims is, by statute, required to be not less than six months, is interesting: "In cases of this character, of claims against the receiver, or the funds, which are frequently very numerous and scattered over a broad territory, it is necessary that some time should be limited within which claims should be presented; otherwise an insolvent estate and the receiver's account could never be closed up and settled. * * * It is conceded that the time may be limited by an order of the court ordering * * * claims to be presented within a reasonable time, not less than six months from the first publication of the order. The court may absolutely require that all claims shall be presented within the time limited in the motion or be barred. The only limit to the discretion of the court is the statutory limit that the notice must be one of at least six months; all else is within the discretion of the court. If, by accident, inadvertence or mistake, a claimant fails to present his claim within the six months, the court may, upon application to it, still permit the claim to be presented. * * * So, too, if a claim has been once presented and disallowed, or allowed for too much or too little, the court may, upon application, in its discretion, again open the matter and authorize or order

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[1] Grinnell v. Merchants' Insurance Co. 1 C. E. Green, 288.

Where a creditor had been notified of the time for the presentation of claims, but had failed to present his claim, and there had been a distribution of the assets, excepting sufficient to pay the expenses of the receivership, it was held that in a suit against the corporation the creditor could not make the receiver a party defendant to throw on him the expense of the litigation. Held, that there was no personal liability of the receiver in the matter. Owen v. Kellogg, 56 Hun, 455.

[2] Lee v. Green (N. J. C.), 28 At. R. 904.

[3] People v. Security Life Insurance & Annuity Co. 79 N. Y. 276.

[4] Id.

a rehearing, even after the expiration of the time limited by notice."[1]

The validity and amount of claims against an estate in the hands of receivers are not usually determined by action, but by reference. When leave is sought to sue receivers for such claims it is the usual practice to deny the application and order a reference, as the cheapest and most expeditious mode of determining the controversy.[2] It is the practice to refer all claims to a referee or master for determination.

[1] People v. Remington, 45 Hun, 347.

[2] Attorney-General v. Continental Life Insurance Co. 88 N. Y. 77.

CHAPTER XXIV.

OF THE RECEIVER'S COMPENSATION.

Section 760. Fixing Amount of Compensation — Payment Of.
761. Of the Rule Where the Amount is Within the Discretion of the Court.
762. The English Rule.
763. The Irish Rule.
764. Of the Rule by Analogy to that in the Case of Executors and Other Trustees.
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769. Generally of the Receiver's Compensation — How Fixed and Paid — Recent Decisions.
770. Of the Rule Where the Receiver Acts in Two Capacities.
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772. Of Compensation for Services as Counsel.
773. Of the Liability for the Compensation of the Receiver.
774. The Rule Where the Appointment is Vacated or was Irregular.
775. Of Appeals from the Settlement of the Receiver's Compensation.

Section 760. **Fixing Amount of Compensation — Payment Of.**—It may be stated at the outset in attempting to discuss the law which falls within the scope of this chapter, that the rules regulating the amount of the receiver's remuneration are in great confusion. In some jurisdictions the compensation of the receiver, particularly in respect of the amount of it, is held to be a matter wholly within the discretion of the court; in others the statutory rules which prescribe the compensation of executors, administrators, guardians and other trustees are held to govern, at least by analogy; while in still others the matter has been precisely determined by the enactment of statutes which fix the compensation of the receiver at a certain per centum of the amount of money that passes through his hands, and which, in some instances, limit the gross amount which the receiver can be allowed for his services.

Accordingly, we find the decisions in great confusion, and it will be impossible to formulate accurately any general rule. It may, however, be laid down as a somewhat general proposition that, in as much as the receiver is an officer of the court, it has the authority,

in the absence of legislation, to determine the amount of his compensation.[1] But when the receiver has been guilty of negligence or misconduct in the management of the fund, the court may, in addition to reducing his compensation, impose a penalty in the shape of a further reduction upon that account.[2]

It is also a general rule that the receiver may be paid at stated intervals during the continuance of his functions, and so need not wait until the determination of the receivership;[3] but, notwithstanding the appointment of a receiver, the party in possession of the fund has the right to pay it, in whole or in part, into court, in order to avoid the expense of the receivership, and, when that is done, the receiver has no such vested right in the fees as will enable him to maintain an action therefor.[4]

Section 761. **Of the Rule Where the Amount is Within the Discretion of the Court.**—In a number of the states the rule prevails that the compensation of a receiver is not to be calculated as a fixed commission, but "is such an amount as would be reasonable for the services required of and rendered by a person of ordinary ability, and competent for such duties and services."[5] This rule makes the compensation depend entirely upon the character of the services rendered by the receiver. In reference to the amount of the compensation in such a case, the court in Iowa, where this rule prevails, has said: "There can be no reasonable grounds to doubt that the receiver in this case, or some other person possessing equal qualifications, could have been employed by private contract to perform the services rendered in this case for half the amount allowed by the referee. This, it seems to us, is the fair and reasonable test by which the amount of compensation to be allowed should be determined."[6]

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[1] Gardiner v. Tyler, 3 Keyes, 505, 508; s. c. 2 Abb. Ct. App. Dec. 247; Magee v. Cowperthwaite, 10 Ala. 966; Stretch v. Gowdey, 3 Tenn. Ch. 565; Baldwin v. Eazler, 34 N. Y. Super. Ct. 275. In the case last cited it appears that a receiver had collected rents which, after deducting agent's commissions, amounted to $388.74, upon which he claimed $132 for his fees, but the court allowed $25, together with some disbursements. *Cf.* Special Bank Commissioners v. Cranston Savings Bank, 12 R. I. 497.

[2] Matter of Commonwealth Life Insurance Co. 32 Hun, 78; Harrison v. Boydell, 7 Sim. 211; The King v. Lidwell, 1 Dru. & W. 26. See also sec. 756, *supra*.

[3] Special Bank Commissioners v. Franklin Institution, 11 R. I. 557.

[4] Haigh v. Grattan, 1 Beav. 201.

[5] Grant v. Bryant, 101 Mass. 567, 570, per Ames, J.; Jones v. Keene, 115 Id. 170.

[6] French v. Gifford, 31 Io. 148. See also sec. 774, *infra*, where this case is more fully considered.

The court, however, will not, upon exceptions to the master's report, reconsider the allowances made by the master for the compensation of the receiver, in a case where the facts are not before it.[1] And, in accordance with this view, the compensation allowed for one year will not necessarily govern as to the amount to be allowed for another year; but the compensation of the receiver may vary with the circumstances of the case.[2] Where the court fixes the compensation of the receiver in advance in the form of a salary, it may make an additional allowance if the facts subsequently seem to justify such a course.[3]

Section 762. **The English Rule.**—In England, where there is no general regulation of the matter by statute, a receiver will, unless it is otherwise ordered, or he consents to serve without remuneration, be allowed as compensation what the master who settles his accounts deems reasonable under all the circumstances of the case. This allowance is either a percentage upon his receipts, or a gross sum by way of salary.[4] Sometimes the salary is such as the judge who passes the accounts thinks adequate,[5] but generally the allowance is 5*l* per cent. Day v. Croft[6] is the leading case, wherein Lord Langdale, M. R., states the law to be that the master must in each case have regard to the degree of difficulty in the due performance of the receiver's duties, and graduate the compensation accordingly. In the opinion his lordship says: "It can not, therefore, be considered as a universal or general rule that 5*l* per cent, should be allowed even upon the receipts of rents or profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection. With respect to other receipts each master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2½*l* per cent, but for gross sums of money this has been very much reduced, and 1½*l* per cent has been allowed upon many occasions. It appears, therefore, that the masters, as they ought, consider upon each occasion what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver."

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[1] Jones v. Keene, 115 Mass. 170.

[2] Special Bank Commissioners v. Franklin Institution, 11 R. I. 557.

[3] Farmers' Loan & Trust Co. v. Central R. R. Co. 8 Fed. Rep. 60.

[4] Daniells' Chan. Prac. 1745; Kerr on Receivers (2d London Ed.), 164.

[5] Neave v. Douglas, 26 L. J. Chan. 756; Wells v. Wales, 31 Eng. Law & Eq. 562; Newport v. Bury, 23 Beav. 30.

[6] 2 Beav. 491; s. c. 9 L. J. (N. S.) Ch. 287; s. c. 4 Jur. 429.

The practice of the masters' office, as above stated, is generally followed in the judges' chambers, in fixing the salary or making an allowance to the receiver.[1] If the amount of property involved be small and the duties are not onerous, the court may appoint a receiver without a percentage,[2] and, if a trustee or a party in interest propose himself as receiver, he will usually be required to act without compensation, unless a salary be expressly stipulated for.[3] In one of the earliest cases the order of appointment contained these words: "And the said master is to allow him a reasonable salary for his care and pains therein,"[4] and this seems, in general, to be the present English rule in point. It is, however, provided by statute[5] in a single instance, that a receiver appointed by a mortgagee shall be entitled to retain out of any money received by him, for his remuneration and in satisfaction of all costs, charges and expenses which he incurs as receiver, a commission at such rate, and exceeding five per centum on the gross amount of all money received, as is specified in his order of appointment; and that, if no rate be specified, then at the rate of five per centum on the gross amount, or at such rate as the court thinks fit to allow upon an application made by him for that purpose.

Section 763. **The Irish Rule.**—In Ireland the English rule seems to have been essentially adopted. There the master allows what seems reasonable under the circumstances, and the practice is the same as in England. In one case the master of the rolls held, that where the receiver is appointed by consent, the amount of the compensation must be fixed by stipulation, and that, in the absence of a stipulation, the court would not, in such a case, allow anything to the receiver for his services.[6] But in a later case it was held that, as a general rule, the receiver is entitled to his poundage, unless the order of appointment provide that none is to be allowed.[7]

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[1] See Seton on Decrees, 425, 1006, and *cf.* Potts v. Leighton, 15 Ves. 276; *Re* Montgomery, 1 Mol. 419; Bristowe v. Needham, 2 Phill. Ch. 190; Courand v. Hammer, 9 Beav. 3; *Re* Ormsby, 1 Ball. & B. 189.

[2] Marr v. Littlewood, 2 Myl. & Cr. 458.

[3] Sykes v. Hastings, 11 Ves. 363; Pilkington v. Baker, 24 W. R. 284; Sutton v. Jones, 15 Ves. 584; but *cf.* Newport v. Bury, 23 Beav. 30.

[4] Carlisle v. Lord Berkley, Amb. 599 (1759).

[5] 44 and 45 Vict. ch. 41, section 24, sub. section 6.

[6] Burke v. Burke, 1 Fla. & K. 89.

[7] Bevan v. White, 8 Ir. Eq. 675. See, also, Fingal v. Blake, 2 Mol. 80; Fitzgerald v. Fitzgerald, 5 Ir. Eq. 525; *Re* Montgomery, 1 Mol. 419; Cook v. Sharman, 8 Ir. Eq. 515; Sadleir v. Greene, 2 Ir. Chan. 330.

Section 764. **Of the Rule by Analogy to That in the Case of Executors and Other Trustees.**—In most of the United States statutes have been enacted which regulate the fees of trustees, executors, administrators and guardians, and attempts are often made to apply, at least by analogy, the same rules to other cases in which the courts are called upon to fix the compensation of persons acting in a fiduciary capacity, and especially in the case of receivers. Accordingly we find that some courts have been induced to apply these rules specifically, while others adopt them in a qualified manner, or apply them only by analogy. Thus, in Maryland, the courts hold that the rules which regulate the compensation of receivers are not of the same rigid character as those which apply in the case of trustees, but that the allowance to receivers of insolvent corporations or private partnerships, in all cases not attended with peculiar circumstances requiring an extraordinary allowance, should be regulated by analogy, as nearly as possible, to the rate of commissions allowed to guardians and trustees for the performance of like services;[1] and where the receivers were appointed solely at the instance and for the benefit of the second mortgage bondholders of an insolvent railroad company, and the trustees who sold the property, were appointed to sell exclusively in their interest, and not for the benefit of the mortgage bondholders, it was held that the first mortgage bondholders could not be assessed to pay to such receivers and trustees the commissions and other expenses allowed, or any part thereof; and that, if the fund in court arising from the sale of the property was not sufficient to afford adequate compensation and indemnity to the receivers, the parties at whose instance the expenses were incurred, should be required to provide the means of payment.[2] A rule similar to this has been applied in New York,[3] in New Jersey[4] and in Alabama.[5] In the latter state, however, it seems not to have been considered imperative.[6]

[1] Tome v. King, 64 Md. 166. The order making the allowance should be definite, in order that it may not be doubtful upon what basis, or for what services the particular allowance is made. Abbott v. Rappahannock Steam Packet Co. 4 Md. Ch. 310.

[2] Tome v. King, 64 Md. 166.

[3] Gardiner v. Tyler, 3 Keyes, 505, 508.

[4] Holcombe v. Holcombe, 13 N. J. Eq. 415, 417. As to an allowance in New Jersey to a receiver for the expense of unnecessary clerks, a daily paper, counsel fees to resist suits that ought not to have been contested, and for money collected and misappropriated by an attorney, see Union Bank Case, 37 N. J. Eq. 420; S. C. affirmed, *sub nom.* Sandford v. Clarke, 38 N. J. Eq. 265.

[5] Magee v. Cowperthwaite, 10 Ala. 966. This case places the rate of commission at 5 per cent on receipts and 2½ per cent on disbursements, as the general rule.

[6] Id.

A receiver may be appointed in proceedings in insolvency at the instance of the insolvent, and, in a proper case, he will be entitled to recover his fees out of the property in his custody; but no receiver ought to be appointed where the property is barely sufficient to pay the indebtedness secured upon it, and if he be appointed in such a case, he will not be allowed his fees out of the fund or property, to the prejudice of the mortgagee.[1]

Section 765. **The Rule in New York.**— In New York, at an early day, receivers were allowed a compensation for their services which was calculated in the same way as the fees of executors and other trustees.[2] And this is, in general, a rule which still prevails when it appears that the performance of the receiver's duties do not involve any special difficulty.[3] But, in the absence of particular legislation, although the courts may follow this method of fixing the receiver's compensation, they refuse to consider themselves bound by it.[4] The matter of the receiver's compensation is, however, at present largely regulated in New York by statute. By the code of civil procedure[5] it is provided that "a receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his lawful expenses, to such a commission, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom he is appointed, allows." And, by another statute, the compensation of receivers of moneyed institutions is limited to ten thousand dollars per annum.[6] In 1886 a statute in relation to receivers of corporations was passed, which authorizes an allowance of five per centum for the first one hundred thousand dollars received and disbursed, and two and one-half per centum upon sums in excess of that amount, and limits the receiver's income in those cases to twelve thousand dollars per annum.[7]

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[1] Lammon v. Giles, 12 Pac. Rep. 417 (Sup. Ct. Washington Territory, 1887). *Cf.* Marr v. Littlewood, 2 Myl. & Cr. 458.

[2] Matter of Kellogg, 7 Paige, 265; Vanderheyden v. Vanderheyden, 2 Paige, 287; Matter of Roberts, 3 Johns. Ch. 43; Matter of Bank of Niagara, 6 Paige, 213; 2 N. Y. Rev. Stat. 470, section 76.

[3] Muller v. Pondir, 6 Lans. 481; Bennett v. Chapin, 3 Sandf. Super. Ct. 673; Howes v. Davis, 4 Abb. Pr. 71.

[4] Gardiner v. Tyler, 3 Keyes, 505; s. c. 2 Abb. Ct. of App. Dec. 247; Baldwin v. Easler, 34 N. Y. Super. 275.

[5] Section 3320. See also Code of Proc. section 244; N. Y. Laws of 1879, ch. 442; Laws of 1842, ch. 3, section 2 a.

[6] N. Y. Laws of 1879, ch. 442. See also Laws of 1842, ch. 3, section 2 a.

[7] N. Y. Laws of 1886, ch. 275, section 2, amending Laws of 1883, ch. 378. The provision of this section is as follows: "Every receiver shall be allowed to receive, as compensation for his services as such receiver, five per centum for the first one hundred thousand dollars re-

In construing these provisions of the statutes it has been held, where a receiver of an insolvent life insurance company was appointed under the act of 1869,[1] and entered upon the performance of his duties prior to the enactment of the statute of 1883,[2] that he was entitled to have his compensation fixed by the superintendent of the insurance department, as provided by the act under which he had been appointed, that the act of 1883 was prospective in its operation, and that, in consequence, it did not apply to receivers who had been appointed and had entered upon the discharge of their duties before its passage.[3] So, also, the commissions of a receiver of an insolvent corporation are to be determined by the law in force at the time of the appointment, and he should not be allowed his percentage upon the amount of the liability of the members resulting from a mere assessment imposed by him, there being no evidence what the value of these assessments were.[4] In a recent case it was held that the act of 1883 applied only to receivers of corporations appointed in proceedings in insolvency, and that a receiver appointed in an action to foreclose a mortgage executed by a corporation, is not entitled to the fees specified in that act, but that his commission is to be regulated by the provision of the code.[5] And it is still the rule in New York that, in determining the amount of the commissions to be allowed to a receiver, the manner in which he has discharged his duties is to be considered.[6]

Section 766. **The Rule in Various Other Jurisdictions.**—In South Carolina the compensation of receivers is regulated by

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ceived and paid out, and two and a half per centum on all sums received and paid out in excess of the said one hundred thousand dollars. But no receiver shall be allowed or shall receive, from such percentages or otherwise, for his said services for any one year, any greater sum or compensation than twelve thousand dollars, nor for any period less than one year, more than at the rate of twelve thousand dollars per year, provided that where more than one receiver shall be appointed the compensation herein provided shall be divided between such receivers."

[1] N. Y. Laws of 1869, ch. 902; see also Laws of 1853, ch. 463; Laws of 1880, ch. 168, section 8 a.

[2] N. Y. Laws of 1883, ch. 378

[3] People v. McCall, 94 N. Y. 587 (February, 1884). In the Matter of the Security Life Ins. & Annuity Co. 31 Hun, 86 (October, 1883), the commissions of such officers were held to be regulated by section 3320 of the Code.

[4] People v. Mutual Benefit Association, 39 Hun, 49 (1886.) In this case it is held that the commissions are to be regulated by section 3320 of the code. The statute of 1869 allowed five per cent on such assets as might come into the receiver's possession, and the court held that the amount of the assessment could not be treated as "sums received."

[5] United States Trust Co. v. New York, West Shore & Buffalo R. R. Co. 101 N. Y. 478.

[6] Matter of the Commonwealth Ins. Co. 32 Hun, 78.

statute, and, in a leading case[1] it is held that a receiver who discharges the duties assigned to him, is entitled to the usual commissions, although, in the particular instance in hand, they appear to be more than a reasonable compensation for the services rendered; that in some instances they may be more and in some instances less than an adequate remuneration, but that even this is preferable to the uncertainty of suffering the rate of compensation to depend upon the discretion of the master, and that it is not a ground for an exception to the general rule, that the business was conducted almost entirely by overseers and factors, in as much as the receiver incurred the responsibility incident to these sub-agencies.[2]

In Tennessee the commission is generally five per centum, as in the case of compensation for other similar services.[3] In Massachusetts the compensation is such as is reasonable for the services rendered by a person competent to perform the duty, rather than any fixed commission,[4] and ought not to be calculated upon the rate of profit in the specific business in the hands of the receiver, nor in reference to the especial fitness of the person who is the receiver to perform the service.[5] And this, it seems, is also the rule in Rhode Island,[6] in Maryland,[7] and in Iowa.[8]

Section 767. **Of the Mode of Calculating the Percentage of Commissions Under Statutes — Succeeding Receiver.**—The statutes usually provide that a certain percentage shall be allowed as compensation for receiving and disbursing the trust fund; and this provision is held to mean that the full commissions are allowable only for the performance of the two acts of receiving and disbursing the fund. It follows, accordingly, that the receiver is to be allowed half commissions for doing either act, and this is the easier method of computing commissions where the accounts are complicated.[9] But a receiver is not entitled to commissions on

[1] Price v. White, 1 Bailey, Eq. 240.

[2] *Cf.* Massey v. Massey, 1 Cheves (part II.), 159, construing the act of 1826, in relation to the compensation of receivers in South Carolina.

[3] Stretch v. Gowdey, 3 Tenn. Ch. 565. But see Woodward v. Williams, 11 Humph. 325, where it seems to have been held that, in the absence of statutory regulation, four per cent is sufficient, and that a receiver's fees can not, at least in the case of sale of lands, exceed in all $100.

[4] Jones v. Keene, 115 Mass. 170.

[5] Grant v. Bryant, 101 Mass. 567.

[6] Special Bank Commissioners v. Franklin Institution for Savings, 11 R. I. 557.

[7] Abbott v. Baltimore & Rappahannock Steam Packet Co. 4 Md. Ch. 310.

[8] French v. Gifford, 31 Iowa, 148.

[9] Matter of Bank of Niagara, 6 Paige, 213. Howes v. Davis, 4 Abb. Pr. 71; Matter of Roberts, 3 Johns. Ch. 48.

amounts invested or reinvested, because that is held not to be a paying out within the meaning of the statute, except where the securities are finally turned over to the beneficiaries, or are otherwise applied in a final payment on account of the estate.[1] And where a receiver is directed by the court to deposit moneys collected by him with a certain trust company, he will not be allowed to treat each deposit as an annual rest, and to credit himself with full commissions thereon.[2]

The surrender of the premium notes of an insolvent mutual insurance company, upon condition that the makers pay such an assessment as shall be sufficient to satisfy all the creditors of the company, is to be deemed, so far as the receiver's claim to commissions is concerned, as so much money received and paid over, and he is entitled to his commissions upon the real value thereof, but only, however, upon those which are collectible.[3] And where a receiver of an insolvent corporation, after levying an assessment upon the members, tendered his resignation, it was held that he could not be allowed commissions upon the assessments, there being no evidence of their value or that they had any value, and because such assessments are not "sums received" within the meaning of the statute, until they are actually paid in.[4] So, also, where all the stock in a corporation was owned by two persons who upon being unable to agree in the management, had a receiver appointed and an order was obtained empowering the receiver to continue the business, and he, thereupon, made such an arrangement with the stockholders that they practically conducted their affairs as before, although under the supervision of the receiver, to whom reports were made, it was held that his commissions were to be calculated only upon the sums actually received and disbursed by him, and not upon the receipts and expenses of the business.[5]

A substituted receiver is entitled only to commissions upon his

[1] In the Matter of Kellogg, 7 Paige, 265, where the rule is laid down in the case of a guardian.

[2] Bennett v. Chapin, 3 Sandf. Super. Ct. 673.

[3] Van Buren v. Chenango County Mutual Ins. Co. 12 Barb. 671, 676. It is to be observed that the receiver had authority to collect these notes, but adopted the other method under an order of the court.

[4] People v. Mutual Benefit Association, 39 Hun, 49.

[5] In the Matter of the Woven Tape Skirt Co. 85 N. Y. 506. The lower court allowed the receiver $7,775; the first appellate court, $4,000, and the court of appeals, $1,500. The actual receipts of the business were $173,998.26, the disbursements $166,988.88. At the time of the appointment the cash and property on hand amounted to between $63,000 and $74,000; the debts to between $12,000 and $15,000. The capital was $40,000, and the receiver had handled personally in all only about $80,000.

own receipts and payments, and not upon those for which his predecessor has been allowed commissions, since, when the fund came into the hands of the first receiver, it was then *in custodia legis*, and the second receiver succeeded to it only for the purpose of disbursing it. This seems to proceed upon the theory that it is the service or duty of collecting and gathering together the fund which subjects it to the charge for commissions, and not the accident of succeeding to its possession after it has been gathered together, and, besides, that only one entire commission for collecting is allowable without reference to the succession of receivers.[1]

In the case of property transferred in specie, the commission will be computed upon the value of the property; and, if the parties can not agree, the court will order a reference to ascertain and report upon the value thereof.[2] Where by statute the receiver's compensation is a per cent. on money received, he is entitled to commission on all assets passing through his hands — notes, book accounts, etc.[3]

But a receiver of a distillery is not entitled to compensation for collections and disbursements of government tax on whiskey in bond belonging to third persons, which tax, as customary among distillers and warehousemen, he collected from the owners on withdrawal of the whiskey from bond. Though customary, such collections are merely for the accommodation of the owners, and no part of the duties of the receiver.[4] Where a statute fixes commission on an amount received and disbursed, it was held that the receiver was not entitled to commission, where the owners of the stock by an arrangement with the receiver, conducted the business and received and disbursed the receipts, and the only money received by the receiver was the proceeds of the sale at auction of the company's property, on which it was held he was entitled to commission.[5]

Section 768. **Of the Compensation of Receivers of Railways.** — In jurisdictions where the compensation of receivers is not regulated by statute the courts are, in general, somewhat more liberal

[1] Attorney-General v. Continental Life Insurance Company, 32 Hun, 228. But see Williamson v. Wilson, 1 Bland, Ch. 439, where there is a dictum to the effect that if the commissions had not already been allowed, the substituted receiver might take them.

[2] Bennett v. Chapin, 3 Sandf. Super. Ch. 673, s. p. Matter of De Peyster, 4 Sandf. Ch. 511.

[3] Van Buren v. Chenango County Mutual Ins. Co. 12 Barb. 671.

[4] White v. Allen, 11 S. W. R. 864.

[5] *In re* Woven Tape Skirt Co. 85 N. Y. 506.

in their allowances to receivers of railways than in the case of other receiverships. The leading case upon this point is Cowdrey v. Railroad Company,[1] wherein it is held that the matter of the allowance to the receiver for his services is one that properly belongs to the master's office and not to the court, and that the receiver is entitled in these cases, as in others, only to a reasonable compensation for his services. To this point the court said: "In cases of moderate amount five per cent on the receipts and disbursements has been allowed. * * * But where the amounts received and disbursed are large, it is not usual to allow a percentage, but to fix the compensation in some other manner. In one case, it is true, it was held that a receiver who discharges his duty is entitled to the usual commissions although they appear to be more than a reasonable compensation for the services rendered, and that it was no ground for an exception to the general rules that the business was conducted almost entirely by overseers and factors, in as much as the receiver had incurred the responsibility incident to these subagencies."[2] In the same opinion, it is said that "it would hardly be a proper rule for governing this case, to inquire what another even competent person would have been willing to do the work for. The receiver's office is not put up at auction. His compensation is not fixed upon that principle at all. The chancellor selects a person whom he regards competent and trustworthy, and the amount of compensation is graduated somewhat by the duties and somewhat by the responsibilities of the situation."

The court may, therefore, properly consider the qualifications of the person appointed receiver, the amount of time which a proper performance of the duties of the position will require, and the manner in which the service is performed.[3] And where a receiver is appointed in two cases, one of which is removed to the United States court which thereafter determines his compensation and directs him to pay the balance into court, a subsequent allowance made by the state court will not attach to that balance, the parties to the one suit not having been heard in the other.[4]

After sale of the railroad the receiver's compensation should be at a less rate than when operating the road.[5]

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[1] 1 Woods, 131, 141; s. c. affirmed, *sub nom.* Galveston Railroad v. Cowdrey, 11 Wall. 459.

[2] Citing Price v. White, 1 Bailey Eq. 240, and the note to Daniells' Chan. Prac. 1435.

[3] McArthur v. Montclair Ry. Co. 27 N. J. Eq. 77.

[4] *In re* Hinckley, 3 Fed. Rep. 556.

[5] Boston Safe Deposit & Trust Co. v. Chamberlain, 14 U. S. C. C. A. 363; s. c. 66 Fed. R. 847.

Section 769. **Generally of the Receiver's Compensation — How Fixed and Paid — Recent Decisions** — The compensation of a receiver is not to be determined in reference to who would take the office for the smallest compensation.

"The compensation," it has been said by the supreme court of Mississippi, "like the appointment, is determined by the court in the exercise of its judicial discretion, and not by the result of bidding, even by persons every way competent to discharge the duties of the office. In allowing the compensation in this state no * * * written rule of judicial requirement is imposed upon the court. The compensation must be reasonable in view of the facts of any case, and in view of the duties and responsibilities of the receiver. By what means or in what manner the court will arrive at its determination as to what sum is reasonable, no presumptive rule is to be found, and the court should have the largest liberty of inquiry and ascertainment before actually deciding. In receiverships of that character in which the officer is at once receiver and manager of the business, a given sum may be allowed as specific compensation for services, and with propriety, as we think. In other cases in which the receiver's duties are confined to the receipt and disbursement of money, the court might wisely refer to the rule and rate of a given percentage in analogous cases, when such percentage is regulated by law, and might properly adopt such rule and rate, if, in its discretion, the same would amount to a reasonable compensation. The reasonableness of the compensation is a matter exclusively for the determination of the court; the manner and means of exercising that discretion in endeavoring to ascertain what is reasonable, must be left largely to such court also."[1]

But on appeal it will be inquired whether the court has abused its diseretion in fixing a receiver's compensation.[2]

Concerning the question of a receiver's compensation the supreme court of Pennsylvania has said: "The amount of his compensation does not depend upon his wealth or social standing or the demands made upon his time by private business; nor yet upon the estimate that gentlemen who are themselves in receipt of an ample income may put upon their services from the standpoint they occupy. The conditions that should be controlling with the court are the time and labor needed, not necessarily the time and labor expended, in the proper performance of the duties imposed; the fair value of such time and labor, measured by the common busi-

[1] Lichtenstein v. Dial, 68 Miss. 54. [2] Id.

ness standards; the degree of activity, integrity and dispatch with which the work of the receiver is conducted. When there has been delay in closing up his accounts, inattention to his trust, use of the trust fund by the receiver in his own private business, or a want in any particular of the good faith and integrity that the court of equity usually requires of all its agents and officers, the compensation may be reduced below the ordinary standard, or denied altogether, as justice and right may require." [1]

There is no doubt of the power of courts of equity to fix the compensation of their receivers. "The compensation is usually determined according to the circumstances of the particular case, and correspondence with the degree of responsibility and business ability required in the management of the affairs entrusted to him, and the perplexity and difficulty involved in that management. * * * Allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct." [2]

It is customary and entirely proper to allow and pay a receiver compensation from time to time before the close of the receivership. The duties are sometimes very onerous and may be protracted for a long time. "It would be unreasonable to expect the receiver to wait until the end of his service before receiving any compensation." [3] It is the usual rule to pay a receiver monthly for his services, reserving the question for a further and final allowance until the end of the suit, when a full compensation is fixed, after notice. [4]

Where the receiver is by statute entitled to "reasonable compensation," it is to be fixed "by considering the responsibility assumed, the skill and labor expended, and the rate of pay usually allowed for similar work." [5] But this is the ordinary way of fixing "reasonable compensation."

When on the circuit bench Brewer, J. said, "As preliminary I remark that there has been no little implied criticism in the language of the appellate courts of the magnitude of the allowance made in foreclosure cases to counsel, receivers and others. We are admonished by utterances of the supreme court to be cautious in this respect. * * * I remark again that the question of allowance is a judicial one, and * * * is left to the discretion of the

[1] Schwartz v. Keystone Oil Co. 153 Pa. St. 283.

[2] Stuart v. Boulware, 133 U. S. 78.

[3] Bank Commissioners v. Franklin Institute for Savings, 11 R. I. 557,

[4] Merchants' Bank of St. Joseph v. Crysler, 14 U. S. C. C. A. 444; s. c. 67 Fed. R. 398; Thompson v. Huron Lumber Co. 5 Wash. St. 527, Stiles, J., dissenting.

[5] Bank Commissioners v. Franklin Institute for Savings, 11 R. I. 557.

court. It is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation."[1]

Where a large bill is presented for services of the receiver and counsel, extending over considerable time, the correctness of which the court has no means of ascertaining, it is proper to refer the matter to determine whether the services have been rendered, and whether the charges are just and proper. Any party interested in the funds of the receivership may be heard thereon.[2]

"As the receiver is directly under the control of the court that appoints him, such court is in a better condition to judge as to the amount which would be reasonable in such a case than the appellate court." But the appellate court has a supervisory jurisdiction over the circuit court in such matters, and will exercise it when the justice of the case demands it.[3]

The rule for compensating receivers is not of the same inevitable character as that governing in the case of trustees. The allowance to receivers in all cases not attended with peculiar circumstances requiring an augmentation, should be regulated by analogy as near as possible to the rate of commissions allowed to guardians and trustees for the performance of like or kindred services.[4] Where a receiver is appointed solely at the instance and for the benefit of second mortgage bondholders, his compensation cannot be charged against the first bondholders.[5] Where the fund in the court is not sufficient to adequately compensate and indemnify a receiver, the parties at whose instance he was appointed should be required to provide the means of payment.[6]

"In the absence of legislation fixing the compensation of a receiver, the court which appointed him has the right to determine the amount that should be paid. In passing upon the compensation of a receiver an appellate court will ordinarily defer much to the judgment below. The compensation should correspond with the degree of business capacity, integrity and responsibility required in the management of the affairs intrusted to the receiver, and a reasonable and fair compensation should be allowed according to

[1] Held that $70,000 apiece was sufficient compensation for the services of Messrs. Tutt & Humphreys as receivers of the Wabash Railroad, though they asked for $112,500 each. Central Trust Co. v. Wabash, St. Louis & Pacific R. Co. 32 Fed. R. 187.

[2] People v. Knickerbocker Life Insurance Co. 31 Hun, 622.

[3] Martin v. Martin, 14 Oreg. 165.

[4] Tome v. King, 64 Md. 166.

[5] Id.

[6] Id.

the circumstances of each particular case."[1] The amount of the receiver's compensation is within the sound discretion of the court, which will not be disturbed by the appellate court, unless abused.[2]

The receiver's compensation is a judicial question, and is not to be settled by the clerk.[3] "The final decree should settle what compensation the receiver is to have, * * * how he shall be paid, whether out of the funds in his hands, or by one of the parties to the action. * * * Ordinarily the receiver should be protected by being permitted to look to the funds in his hands to save himself against loss; but sometimes he has been compelled to look for indemnity to the party at whose instance he was appointed."[4]

A receiver having been authorized to retain his compensation out of the proceeds of the sale of the property, it was said that he had no right to the fund until paid into court for distribution, and that the purchaser could not set-off against the demand for the purchase money a personal debt due to him from the receiver.[5]

Compensation to a receiver is part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts.[6]

The receiver must prove the services performed, and his final compensation should be heard only after notice to all the parties. Where receivers contract to render services for a certain sum, such sum is the limit of compensation to be paid them, especially where it is ample for their services.[7]

A receiver may, when discharged for dereliction of duty, be refused any compensation.[8] And where the parties to a suit asked for the appointment of one interested therein as receiver, and represented to the court that the selection would save an expense to the estate, as he would serve without compensation, and the appointment was made, it was held that no compensation would be allowed the receiver.[9]

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[1] Heffron v. Rice (Ill. S. C.), 36 N. E. R. 562.

[2] Chandler v. Cushing-Young Shingle Co. (Wash.), 42 Pac. R. 548. Five thousand dollars held to be sufficient compensation for receivers who operated thirteen miles of railroad for about three and one-half years.

[3] Cutter v. Pollock (N. D.), 59 N. W. R. 1062.

[4] Id.

[5] Polk v. Garner Coal & Mining Co. (Io.), 60 N. W. R. 111.

[6] Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475; s. c. 20 S. E R. 770; Espuella Land & Cattle Co. v. Bindle, 32 S. W. R. 582, holding receiver's fees to be "court costs" within the statute.

[7] Eastern v. Houston & Texas Central Railway Co. 40 Fed. R. 189.

[8] *In re* Estate St. George, 19 L. R. Ir. 566.

[9] Steel v. Holladay, 19 Oreg. 517.

"As a general rule, where a receiver has been regularly appointed, his compensation is a charge upon the funds in his hands. But in this case all the funds that came to his hands were appropriated without satisfying his claim for compensation. So that it is a case where the receiver has no assets in his hands applicable to the payment of his charges. * * * Of course the receiver could not be retained merely to enable him to reduce such assets to possession for the purpose of paying his charges. That would be continuing the receiver for the benefit of the receiver, a thing never heard of." It was said that there might be some circumstances under which the court would refuse to discharge a receiver until his compensation was paid.[1]

Where on the application of plaintiffs, who sued to remove an incumbrance from personal property, a receiver was appointed who took charge of and sold the property and retained the proceeds subject to the order of the court, and the judgment was against the plaintiffs, held proper to allow the receiver compensation out of the fund before applying it to the payment of the defendant's debt.[2]

Where a receiver is appointed without any probable cause for so doing, the party at whose instance the appointment was made should pay all the expenses.[3] Though the order appointing a receiver be vacated as having been improvidently made, yet, for the services rendered he is entitled to compensation.[4]

Section 770. **Of the Rule where the Receiver Acts in Two Capacities.**— As a general rule it may be stated that, where a receiver acts in more than one capacity in dealing with the fund or property in his hands, if he be allowed compensation for his services in one, his compensation in the other must be nominal, or may be wholly disallowed. Thus, where a receiver of partnership property sold the business to a new firm, agreeing to conduct the business of the new firm for $200 per month, and such new firm furnished his bond and paid his traveling expenses, and all he had to do as receiver was to collect the debts due to the old firm, which he did while traveling for the new firm, it was held that $50 per month was sufficient compensation for such services, and that an allowance of $2,400 for eight months was excessive.[5] And where receivers were appointed

[1] Joslin v. Athens Coach & Car Co. 43 Minn. 534.

[2] Henbree v. Dawson, 18 Oreg. 474.

[3] Myers v. Frankenthal, 55 Ill. App. 390; Einstein v. Lewis, 54 Ill. App. 520. See sections 119 and 769.

[4] Louisville & St. Louis Railroad Co. v. Southworth, 38 Ill. App. 225.

[5] Martin v. Martin, 12 Pac. Rep. 284 (Sup. Ct. Oregon, 1886). This case should also be consulted as authority upon the question of procedure under the Oregon statutes, upon the application of a receiver for compensation.

to take possession of certain property in the place of the executors under a will, and they acted jointly with one of the executors, they were allowed only the compensation usually allowed to executors.[1] And where a master in chancery acts as receiver, he is entitled only to the compensation of a receiver, his character as such being entirely distinct.[2]

It has already been shown to be contrary to the policy of the law to allow a party interested in the fund or property any compensation where he is appointed receiver.[3]

Section 771. **Of Additional Compensation for Extra Services.**— It is a general rule that the regular allowances made to a receiver for his services must be held sufficient to compensate him for all the labor which he performs in connection with the receivership, and, hence that he is not entitled to anything in addition thereto.[4] Thus, where a receiver was appointed of the estate of a minor, and he attended to a survey of the realty, and then petitioned the court for an extra allowance upon the ground that by his exertions the estate had been considerably increased, the court said: "This has been entirely a voluntary act, there was no order for the receiver to attend on the survey; he did not pay the expenses attending it; they were paid out of the minor's estate, and I do not see how I can allow him anything for his extraordinary trouble."[5] Nor will the receiver be allowed a per diem compensation for particular services, the commissions upon moneys received and paid out being in satisfaction of all personal services by the receiver, except such taxable costs as are allowed to attorneys and solicitors by the fee bill, if he act in that capacity;[6] and no allowance will be made for services or expenses incurred by the receiver in going, without authority of the court, to foreign countries to recover money belonging to the estate, even though approved by some of the parties.[7] But where a receiver of a railroad, in addition to his duties as receiver, acted as superintendent and attorney, the court made him an allowance in as much as he had thereby saved a considerable outlay.[8]

The fact that a receiver may perform duties from which others

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[1] Holcombe v. Executors of Holcombe, 18 N. J. Eq. 417.

[2] Arthur v. Master, 1 Harper Ch. (S. C.) 47.

[3] Berry v. Jones, 11 Heisk. 206;

[4] Hynes v. McDermott, 3 N. Y. St. Rep. 582, 585 (Com. Pleas, 1886)

[5] *In re* Ormsby, 1 Ball & B. 189.

[6] In the Matter of the The Bank of Niagara, 6 Paige, 213, 216, citing Vanderheyden, 2 Id. 287.

[7] Malcolm v. O'Callaghan, 3 Myl. & Cr. 52.

[8] Farmers' Loan & Trust Co. v. Central R. R. Co. 8 Fed. Rep. 60.

may derive a benefit, or which he may not be required to perform, but may employ others to do, yet if he chooses to perform such services, and his authority to do so is derived from his office, it furnishes no basis for an extra charge, but is included in his compensation as receiver. It is stated, as a general rule, that where a receiver acts in more than one capacity his compensation must be nominal or wholly disallowed; and that the regular allowance made to the receiver for his services must be held sufficient to compensate him for all the labor which he performs in connection with the receivership, and as a result he is not entitled to anything in addition thereto. No doubt where a receiver performs duties in addition to those ordinarily required, it may form the basis of an extra allowance, which the court may grant.[1]

Section 772. **Of Compensation for Services as Counsel.**— The rule as to allowing a receiver compensation, in addition to his regular commissions, for legal services rendered by himself, was thus declared by Chancellor Walworth. "The receiver was not entitled to charge for extra counsel fees to himself, in addition to the legal taxable costs in suits prosecuted or defended by him as attorney or solicitor; nor was he entitled to any allowance in the character of counsel for himself or his co-receiver, in relation to any other matter. The employment of counsel and the payment of a proper allowance for such services, when necessary, require the exercise of a sound discretion on the part of the receivers or the trustee of the fund out of which such services are to be paid. It would, therefore, be as unsafe to allow a receiver or other trustee to contract with and pay himself for such extra services, as it would be to allow him to become the purchaser of the trust property which it is his duty to sell to the best advantage for the benefit of the estate. If he employs third persons as counsel, and where he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger that the estate entrusted to his care will not be charged with counsel fees which might safely have been dispensed with. No allowance for extra counsel fees to himself can, therefore, be made to a receiver, or other trustee, upon the settlement of his accounts."[2]

Nor will counsel fees be allowed for services rendered by the receiver, before his appointment, to an administrator who was one of

[1] Thompson v. Williamette S. M. L. & Mfg. Co. 15 Oreg. 604.

[2] Matter of the Bank of Niagara, 6 Paige, 213.

the parties to the proceeding in which the appointment was made. Such a fee is not a proper charge upon the fund in his hands as receiver, but, if otherwise proper, it might be allowed to the adminstrator upon his accounting in the probate court.[1] In Tennessee, it has been held, where a receiver of an extinct corporation appointed by act of the legislature with a fixed compensation, performed legal services in the execution of his duties as such receiver, that the legislature had the power to provide, by subsequent act, for an adequate remuneration for those services, even though they were performed before the statute was passed.[2]

Section 773. **Of the Liability for the Compensation of the Receiver.**— The great underlying rule is that the compensation of a receiver is a charge upon the funds which may come into his hands.[3] Thus, where a receiver of an insolvent partnership was appointed in a suit by an attaching creditor to set aside certain conveyances as fraudulent, the receiver was paid out of the fund notwithstanding that the suit failed.[4]

In as much as the receiver is an officer of the court and as such takes possession of the property the right to which is involved in dispute, and holds it by order of the court, for the benefit of the party who shall ultimately be found to be entitled to it, his compensation can not be made to depend on the result of the litigation, but he is entitled to have his fees paid out of the funds in his hands, no matter to which of the parties to the action possession be finally adjudged.[5] And where an insurance company went into liquidation upon effecting a reinsurance, and assigned certain bonds for the protection of sureties upon the indemnity bond given by it to the com-

[1] Battaile v. Fisher, 36 Miss. 321. Where an executor was also an attorney, and was requested by his co-executors to appear and defend a suit against the estate, held, that he could not recover extra compensation therefor, but was only entitled to compensation as executor. Collier v. Munn, 41 N. Y. 143.

[2] State v. Butler, 15 Lea. (Tenn) 113. The court, in this case, recognized fully the rule that ordinarily the receiver is not entitled to compensation for legal services rendered by himself.

[3] Garniss v. Superior Court, 88 Cal. 413; Jaffray v. Raab, 33 Northwestern Rep. 337; Seligman v. Saussy, 60 Ga. 20; Radford v. Folsom, 55 Iowa, 276; Hutchinson v. Hampton, 1 Montana, 39; Beckwith v. Carroll, 56 Ala. 12; Hopfensack v. Hopfensack, 61 How. Pr. 498; Courand v. Hamner, 9 Beav. 3; Attorney-General v. Lewis, 8 Id. 179.

[4] Jaffray v. Raab, 33 Northwestern Rep. 337. The reasons given were that the receiver was appointed by the consent of the parties, that the case was a proper one for a receiver owing to the conflicting claims of creditors irrespective of the particular suit, and that the appointment was not attended with any additional expense.

[5] Hopfensack v. Hopfensack, 61 How. Pr. 498. See, also, section 774, *infra*.

pany with which it reinsured, under an agreement that, at the termination of the liability of the sureties, the bonds should be apportioned among the stockholders of the dissolved company, the receiver of the reinsuring company which had become insolvent, was held entitled to resort to the bonds distributed under the agreement, only to the extent necessary to pay the debts and reasonable costs of the receivership.[1]

The party to whom the property is finally awarded, takes it subject to these charges.[2] But it may sometimes happen that a direct liability is imposed upon the parties to the action, or upon some of them, for the remuneration of the receiver. This may result from the irregularity of the appointment, or from the insufficiency of the fund, or out of the agreement between the parties. Thus, where one having been appointed receiver of an insolvent corporation, entered regularly upon the discharge of his duties, and his appointment was subsequently vacated, the parties stipulating that he should be protected and agreeing that, upon his removal, his commissions should be fixed by a reference, and one of the parties, in consideration of certain premises contained in the agreement, agreed to pay the commission, such party became thereby personally liable and could not object to the amount of the commissions when they were fixed.[3]

And where, under the same instrument, two distinct tracts of land were leased for a term of years at a fixed rental per acre, the lessors covenanting for quiet possession, and the title to one of the tracts was in litigation — a fact which was known to the lessees — and, the suit resulting adversely to the lessors, the lessees abandoned the lands and thereby rescinded the contract contrary to the wish of the lessors, and, thereafter, the lessors filed a bill seeking to recover, *inter alia*, the rents due under the lease, and had a receiver appointed, it was held that the compensation of the receiver should be paid out of the rents collected by him, and that the defendants should be credited with these rents less the receiver's commission.[4] And where a receiver was appointed at the instance and for the benefit of the second mortgage bondholders of a railroad, they were

[1] Heman v. Britton, 88 Mo. 549; s. c. 5 West. Rep. 330.

[2] Hopfensack v. Hopfensack, 61 How. Pr. 498; Beckwith v. Carroll, 56 Ala. 12.

[3] Kelsey v. Sargent, 2 N. Y. State Rep. 669 (Sup. Ct. 1886). See, also, s. c. 40 Hun, 150, 663. Such an agreement being made in the action in which the reference was ordered may be enforced in the same action and a separate action need not be brought.

[4] Hayes v. Ferguson, 15 Lea (Tenn.) 1. The court held that the lessees were not warranted in rescinding the contract and abandoning the premises, but that they were liable for the rents.

required to provide for the payment of the receiver, the fund arising from the sale of the property not being sufficient to afford an adequate compensation.[1] So, also, where the receiver and manager of a business desired to advance money of his own for the purposes of the business, it was held, in an English case, that he might, before doing so, apply to the court, which, if it authorized him to make the advances proposed, might also allow him interest and give him a charge upon the assets for the advances and interest, and that, if he made the advance without such authority he would still be entitled to indemnity out of the assets, but could not obtain a personal order against the trustees for payment.[2] Where the appointment is made for the benefit of all, the expenses should be shared by all.[3] It has been held in New York, where the receiver of a life insurance company was entitled to have his compensation fixed by the superintendent of the insurance department, that he might have a mandamus to compel the superintendent to determine the amount thereof.[4] So, also, it has already been shown that, where a stipulation in the cause imposes a personal liability on some of the parties, it may be enforced in the same action, and that there need not be on that account a resort to an independent proceeding.[5] And it is error to allow a judgment against the parties to the cause for the receiver's compensation, upon a motion therefor, the proper procedure being to have the compensation allowed, taxed as costs and charged upon the fund in his hands.[6]

Section 774. **The Rule Where the Appointment is Vacated or Was Irregular.**—The rule that the compensation of a receiver is a charge upon the fund in his hands, has been held not to apply, without qualification, to the case where the appointment was irregularly made and is vacated. Thus, where an order appointing a receiver of a savings institution was vacated and the receiver ordered to deliver up the assets thereof which had come into his hands, the court refused to allow him more than a reasonable compensation, saying: "It is insisted by plaintiff's counsel that the compensation of the receiver should be paid out of the fund of which he had the custody and charge, and that he should be permitted to retain the same therefrom. Numerous cases have been cited to show that such is the uniform practice. Upon examination of these cases, it

[1] Tome v. King, 64 Md. 166. The first mortgage bondholders were held not liable for any part of the expenses.

[2] *Re* Bushell, L. R. 23 Ch. D. 75

[3] Johnson v. Garrett, 23 Minn. 565.

[4] People v. McCall, 94 N. Y. 587.

[5] Kelsey v. Sargent, 2 N. Y. State Rep. 669; s. c. 40 Hun, 150, 663.

[6] Hutchinson v. Hampton, 1 Montana, 39.

will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver, and that in each case the receiver closed up the business and settled his accounts in pursuance of his appointment. The receivership in each case was for the benefit of those interested in the fund, and he was paid therefrom, which is only another method of apportioning the costs upon those entitled to the fund. * * * We think it would be an unjust and inequitable rule if in all cases the receiver should be entitled to his compensation out of the fund in his hands, without reference to the legality of his appointment. * * * In view of all the facts and circumstances, we order that, in addition to the other costs and expenses allowed, including clerk-hire, rent, taxes, etc., to the receiver out of the fund, as shown by the report of the referee, said fund be charged with one-third of the compensation herein allowed to the receiver, and that the other two-thirds be adjudged against the plaintiff." [1]

Where a receiver took into his possession certain property, supposing it to be part of the fund of which he was appointed receiver, but which was subsequently adjudged to belong to third parties, and every act which had been done by the receiver with reference to the property, had been done against their protest and had tended to defeat their rights, the real owners could not be compelled to pay or contribute anything to the payment of the costs incurred, but the receiver was compelled to look for his compensation to the party at whose instance he was appointed.[2] And where a company was enjoined from prosecuting its business, a receiver being appointed to take charge of its property, and the injunction was thereafter dissolved, the cause dismissed and the receiver ordered to restore to the defendant company all of its property, together with the profits derived therefrom, with costs to the defendant, it was held that the compensation of the receiver was taxable as costs against the plaintiff, the appointment of the receiver having been made at his instance and upon his motion, and the whole litigation having been wrongful.[3]

[1] French v. Gifford, 31 Iowa, 148, 430. See Hopfensack v. Hopfensack, 61 How. Pr. 498. In a New York case where a receiver was erroneously appointed upon an *ex parte* application, the court, on appeal, directed him to pay into court all the property which came into his hands, and directed that, if the complainants did not amend and proceed by order to show cause within a certain time, or if the defendant gave security, the funds were to be immediately restored to the defendant. In this case no compensation was allowed. Verplanck v. Mercantile Insurance Co. 2 Paige, 438.

[2] Howe & Co. v. Jones, 66 Iowa, 156; s. c 23 Northwestern Rep. 376.

[3] City of St. Louis v. St. Louis Gas Light Co. 11 Mo. App. 237. Subse-

It appears in New York, that, if the receiver resign or be subsequently removed, the allowance of his commissions is not discretionary except so far as the provision of the code limits the maximum rate of percentage;[1] but in case of misconduct the court may still exercise its equitable jurisdiction to punish the delinquency by the imposition of a penalty.[2]

Section 775. **Of Appeals from the Settlement of the Receiver's Compensation.** — It is well settled that an order granting or refusing an allowance to a receiver for his services is appealable, both upon the part of the receiver and of the parties to the cause. The courts have frequently passed upon the questions raised by such an appeal without having been called upon to consider the abstract right of appeal, and the cases cited in this chapter are, it may be supposed, sufficient evidence of the existence thereof.[3] It is, however, a general rule that, in the event of such an appeal, the appellate court will attach the greatest weight to the judgment of the lower court, upon the theory that the facts were the more fully presented to the inferior tribunal.[4]

Where the receiver's compensation is determined by a jury, and he moves for a new trial upon the ground of alleged error in the charge, the court will consider the questions thus raised just as it would any other question that had been submitted to the jury. Thus, in such a case the court said that the charge "must be considered as a whole, and so considered, it submitted the question fairly to the jury, 'whether under the evidence the amount allowed the receiver by the master was a reasonable and fair compensation for the services rendered by him as receiver;' and the jury were instructed, if they found the amount insufficient for that purpose, to sustain the exceptions, and state in their verdict what amount the receiver was entitled to for his services. This the jury did. There

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quently in the same case it was held that the fees paid by the receiver to his counsel were part of the costs of administration to be paid out of the trust fund, and, that they were not taxable as costs. S. c. 11 Mo. App. 243, and 87 Mo. 224.

[1] People v. Mutual Benefit Association, 39 Hun, 49; Matter of Commonwealth Fire Ins. Co. 32 Hun, 78.

[2] Further upon the subject of this section see sections 119 and 769.

[3] Magee v. Cowperthwaite, 10 Ala. 966; Herndon v. Hurter, 19 Fla. 397. Text approved in Thompson v. Huron Lumber Co. 5 Wash. St. 527.

[4] Hinckley v. Railroad Co. 100 U. S. 153, where the court said: "We do not see that the economical administration of insolvent companies will be promoted, or that justice requires a higher standard of compensation than that these [i. e. circuit] courts generally give, to whose discretion the subject must be largely remitted." S. P. Morgan v. Hardee, 71 Ga. 736.

is evidence to sustain their verdict, and the court below having refused a new trial, and there being no error of law, under the rule so often laid down by this court, we affirm the judgment."[1]

As a question of practice, it has been held that, where the court had granted an order making an allowance to the receiver, by agreement of the parties, but no appeal was taken from the order, and after the lapse of several months, one of the parties moved to set aside and vacate the order, that motion being overruled, the remedy of the party is to appeal from the order making the allowance, if that can be done within the prescribed period, because no appeal will lie from the order overruling the motion to vacate.[2]

[1] Wilkins v. The Georgia Iron Works, 74 Ga. 532, 533.

[2] Russell v. First National Bank, 65 Iowa, 242.

CHAPTER XXV.

OF THE REMOVAL, SUBSTITUTION AND DISCHARGE OF RECEIVERS.

I.

REMOVAL AND SUBSTITUTION OF RECEIVERS.

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II.

DISCHARGE OF RECEIVERS.

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I.

Removal and Substitution of Receivers.

Section 776. **Distinction Between Removal and Discharge — Power to Remove — Vacating the Appointment — Discretion.** — A distinction indicated by the terms themselves, is to be drawn

between the removal and the discharge of a receiver. The discharge of the receiver is, in general, the termination of the receivership, while the removal of the receiver, upon his own motion or for cause, and the substitution of another person or persons in his stead, is a proceeding not inconsistent with the continuance of the receivership. The rules of law, however, which regulate the removal of a receiver are, in general, applicable to the case of his discharge, but the cause is different.

A receiver is removed when it is made to appear that the interests of the parties concerned require it, and a receiver is discharged when the objects sought to be obtained by his appointment have been accomplished. In the one case the property in litigation continues in the possession of the court, subject to the final decree, while in the other case it passes pursuant to the decree to the party entitled.[1] The power of removal being incident to the power of appointment, the court, whose officer the receiver is, may, in a proper case, direct his removal, and may impose such conditions in connection therewith as seem just.[2] The court is not limited in respect of time in the matter of the removal of the receiver, but may act thereon whenever it seems proper and at any stage of the litigation.[3] Thus, where the receiver's security is insufficient, the court may remove him summarily and direct the delivery of all the assets to his successor, if he neglect or refuse to procure additional sureties.[4] So, also, where it subsequently appears that the appointment of the receiver was improvidently made, the court may unquestionably vacate the appointment and thus remove the receiver;[5] and that, too, even where the plaintiff's action has been dismissed and there is pending a motion for a new trial.[6] But the court may properly require, as a condition precedent to an order vacating the appointment, that the receiver's expenses and compensation be provided for by the moving party.[7]

The term "remove," as applied to a receiver, means simply a

[1] *Ex parte* Brown, 15 S. C. 518.

[2] Shackelford's Adm'r v. Shackelford, 32 Gratt. 481; Ferry v. Bank of Central New York, 15 How. Pr. 445, 458.

[3] *In re* Colvin, 3 Md. Ch. 300; Crawford v. Ross, 39 Ga. 44; Siney v. New York Consolidated Stage Co. 28 How. Pr. 481; s. c. 18 Abb. Pr. 435.

[4] Shackelford's Adm'r v. Shackelford, 32 Gratt. 481.

[5] Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 16.

[6] Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 16.

[7] McCarthy v. Peake, 9 Abb. Pr. 164. In this case there were two actions between the same parties, and in reference to the same property, pending at the same time in different courts, and the motion to stay proceedings and to vacate the order of appointment in the later suit was granted upon the condition stated in the text.

change in the *personnel* of the receivership, which continues unaffected. The effect of the removal is only to substitute one person for another in the office. The cause of the "removal" of a receiver is some personal objection to him.

To "vacate" the appointment is to set aside the order of appointment because improvidently granted, the motion for which is based on the circumstances and conditions attending the appointment.

The "discharge" of a receiver relates to the termination of the receivership, and is asked and ordered for the reason that, because of the state of the suit, there is no longer any necessity for continuing the receiver. The terms "remove," "vacate" and "discharge" are frequently used indiscriminately; but, from the context, the sense in which they are used is readily understood.

The power to remove or discharge a receiver, or to vacate the appointment, is implied in the power to make the appointment, and is as well founded as the latter.[1]

"The exercise of the power to remove a receiver for cause is regarded as a matter properly resting in the discretion of the court, and must necessarily be governed by the circumstances of each particular case; and, as an officer of the court, the receiver should remain unbiased and impartial, or be removed. The position is one often requiring the exercise of the soundest judgment and always the strictest impartiality among creditors."[2]

Under a statute conferring power upon the state treasurer, auditor and secretary to appoint a receiver of a bank, no provision being made as to whom he should report or his removal, it was held that the power of removal was not incident to that of appointment;[3] a proposition to be seriously questioned. When all the creditors, excepting the complaining one, desired the retention of the receiver, a motion to remove him was denied.[4] The cost of proceedings to remove a receiver for dereliction of duty has been imposed on him.[5]

Section 777. **The Power to Remove is Discretionary.**— In as much as the power of a court of chancery to remove a receiver for cause is a matter which rests peculiarly in the sound discretion of the court, it is to be noted that the exercise of it will depend essen-

[1] Cincinnati, Sandusky & Cleveland Railroad Co. v. Sloan, 31 Ohio St. 1.

[2] First National Bank v. Barnum Wire and Iron Works, 60 Mich. 487.

[3] State *ex rel.* v. Claypool, 13 Ohio St. 14.

[4] First National Bank v. Barnum Wire & Iron Works, 60 Mich. 487.

[5] *In re* Estate of St. George, 19 L. R. Ir. 566.

tially upon the circumstances of each particular case, and upon the duty of the court to secure, as far as practicable, the rights of all the parties concerned in the protection and distribution of the fund.[1] Thus, courts of equity will protect the interests of the minority holders of the mortgage bonds of a railroad company as against the majority, and will remove receivers appointed at the instigation of the majority, where it appears that such receivers are incompetent and that part of them have interests in other corporations adverse to the interests of the minority mortgagees, and are using their influence and powers as receivers to promote their own individual interests at the expense of the railroad.[2] But an application for the removal of a receiver of corporate property made by certain of the stockholders, where it appears that the majority of the directors are in active sympathy and willing to co-operate with them, will be denied, upon the ground that the corporation, by its directors, is, under such circumstances, the proper party complainant.[3]

Section 778. **Of the Practice Herein — The Charges and Proofs.** — All proceedings which directly affect the receivership ought regularly to be commenced in the same suit and before the same court in which the appointment of the receiver was made. Accordingly it was held that a proceeding to remove or suspend a receiver must be commenced by motion in the suit in which he was appointed.[4] And in a proceeding to substitute a new receiver, founded upon the pleadings and proceedings in the action, the regularity of the original order appointing the receiver and of the

[1] First National Bank of Detroit v. E T. Barnum Wire & Iron Works, 58 Mich. 315; s. c. 27 N. W. R. 657; s. c. 60 Mich. 487; Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 16; Bayly v. Gaines, 2 S. E. R. 739 (Va. 1887); Lottimer v. Lord, 4 E. D. Smith, 183; Siney v. New York Consolidated Stage Co. 18 Abb. Pr. 435; s. c. 28 How. Pr. 481; Connolly v. Kretz, 78 N. Y. 620; Wetter v. Schlieper, 7 Abb. Pr. 92. In New York the appellate branch of the lower courts has power to review the question of the validity of the grounds of the appointment, but the court of appeals has not. Connelly v. Kretz, 78 N. Y. 620; Dollard v. Taylor, 33 N. Y. Super. Ct. 496. But where the judge to whom application is made to approve the sureties and thus to consummate the appointment, revokes the appointment and substitutes another person as receiver, his order is not appealable. Siney v. New York Consolidated Stage Co. 28 How. Pr. 481; s. c. 18 Abb. Pr. 435. *Cf.* Milwaukee & Minnesota R. R. Co. v. Soutter, 2 Wall. 510; Koontz v. Northern Bank, 16 Wall. 196, 202.

[2] Atkins v. Wabash, St. Louis & Pacific Ry. Co. 29 Fed. R. 161; s. c. *sub nom.* Central Trust Co. v. Wabash, St Louis & Pacific Ry. Co. 1 Ry. & Corp. L. J. 12.

[3] Fifth National Bank of Pittsburgh v. Pittsburgh & Castle Shannon R. R Co. 1 Fed. R. 190.

[4] Davis v. Michelbacher, 31 N. W. R. 190 (1887).

proceedings generally in that suit, can not be attacked collaterally.[1] But where a receiver was appointed without the knowledge or consent of the defendant's counsel although he was present in court for the purpose of opposing the motion, and the defendant thereafter moved to vacate the appointment, the court held his position to be the same as though he were opposing the original motion.[2]

In a proceeding seeking the removal of the receivers of the Northern Pacific Railroad Company, Judge Jenkins clearly and properly announced the rule as to specifying the charges and adducing proof. He declared that the moving party should present specific charges, and be required to prove them; that the application for removal being in the nature of a motion addressed to the sound discretion of the court, it should first be considered and determined whether the charges were sufficiently grave in their nature to call for answer, and were properly pleaded, and, if answered to, whether they had been sufficiently refuted to satisfy the court with respect to the integrity and competency of its officers; and that it rested with the court, if it was not wholly and fully satisfied with respect to the charges stated in the petition, to refer the matter for proof, either generally, touching all the charges of the petition, or limited to such matters in respect of which the court desired further explanation. "And this," he said, "I conceive to be the proper practice in such cases. In general, the party who seeks the court to remove one of its officers for malfeasance or incompetency should be prepared, not only to prefer specific charges of wrong doing, but to accompany them with proof. It ought not to be tolerated that upon mere vague and unsupported charges one should be compelled to submit to a sweeping investigation into his conduct, and that upon such charges a court could properly be asked to order

[1] Fassett v. Tallmadge, 13 Abb. Pr. 12. It is to be observed that the motion in this case was made by the plaintiff in a creditor's action and that the defendant attacked the whole proceeding as illegal and void. This defence the court refused to allow, on the ground of surprise, but the motion was granted without prejudice to the right of the defendant to set the whole proceeding aside as irregular.

[2] Merchants & Mechanics' Bank v. Griffith, 10 Paige, 519. The chancellor said: "The excuse for not having opposed the motion is unquestionably sufficient, as it was probably owing to inadvertence on the part of the court in allowing such a motion to be made as a matter of course, before taking up litigated motions, that the defendant's counsel was deprived of the opportunity of opposing the motion when it was made. The defendant should therefore be placed in the same situation as if the complainant's application for the appointment of a receiver was now to be heard and decided upon the papers before me." Accordingly the order was vacated.

a general investigation to ascertain whether something might not be found objectionable to his standing. It is a fundamental and most just principle of law that one should not be put to answer vague and indefinite charges."[1]

It was said by Judge Jenkins that answering the charges would waive all objections as to their indefiniteness, which is but the announcement of a general rule of pleading.

Section 779. **Of the Jurisdiction to Remove the Receiver — Notice.** — It was the early rule in equity that the application for the removal of the receiver could be made only to the court by which he had been appointed, and whose officer he was,[2] and this doctrine prevails in the United States[3] with the modification that if a suit attended by a receiver be removed to another court, state or federal, the latter court has entire jurisdiction of the whole proceeding and may remove the receiver or vacate the appointment. This qualification of the rule which formerly prevailed in chancery was a necessary outgrowth of our complex system of state and federal courts, and of the power of the removal of causes from one of these classes of courts into the other, and from one state court to another.

It is also sometimes provided for by statute, and may be rendered proper or even necessary where the court which made the appointment is not sitting, and there is reason for immediate action. Thus, in a case where a cause in a state court was removed to a United States court, an injunction having been granted and a receiver appointed in the state court prior to the removal, it was held that a motion to remove the receiver might properly be made in the federal court at any time after the filing of the record, in as much as no such motion had been made in the state court at the time of the removal.[4] In Ohio it has been held that, during vacation, an application for the removal of a receiver may be made to a judge at chambers, where a manifest injustice to the parties in interest would

[1] Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 61 Fed. R, 546.

[2] Young v. Montgomery, 2 Woods, 606. In this case it was further held that another court, even where it had the power to grant leave to sue the receiver, could not entertain a proceeding looking to his removal, upon the theory that such complainants could have a standing in court only as parties to the suit in which the receiver had been appointed.

[3] Garfield National Bank v. Bostwick, 14 N. Y. S. 919.

[4] Texas & St. Louis Ry. Co. v. Rust, 17 Fed. Rep. 275, 280; Mahoney Mining Co. v. Bennett, 4 Sawyer, 289; Dillon's Removal of Causes (4th edition), section 80; Foster's Federal Judiciary Acts, 19, 39. See, also, Hinckley v. Railroad, 100 U. S. 153, and *cf.* Atkins v. Wabash, St. Louis & Pacific Ry. Co. 29 Fed. Rep. 161.

result from the delay incident to deferring the application to the court which made the appointment.[1] And the courts of other states incline to similar views in cases arising under the codes of procedure as well as those which are governed by the general usage of courts of chancery.[2]

A motion to remove a receiver will not be granted unless he has had reasonable notice in writing of the motion, and the notice should set forth specifically the grounds upon which the application is to be made.[3] "A receiver is the officer of the court, and an order appointing him may be revoked without giving him notice to show cause why it should not be done. He is no party to the proceeding instituted for that purpose. It is only in cases where his conduct is called in question and where it is sought to make him liable, or where he is called upon to account or to make return, that he is entitled to notice, or to a hearing."[4]

Section 780. **Further of the Removal of Receivers and Notice.** —In New York the rules regulating the removal of receivers in certain classes of cases are prescribed by statute, and, in the case of receivers of corporations, the attorney-general is given extensive powers in this respect.[5] Construing this statute it has been held that the receiver of an insolvent corporation appointed in one judicial district can not be removed upon an application made in another judicial district;[6] and that, where the court has power by

[1] Cincinnati, Sandusky, etc. R. R. Co. v. Sloan, 31 Ohio St. 1.

[2] Penn v. Whitehead, 12 Gratt. 83; Gibson v. Martin, 8 Paige, 482; Milwaukee & Minnesota R. R. Co. v. Soutter, 2 Wall. 510; Crawford v. Ross, 39 Ga. 44; Waters v. Jones, 1 Kelly (Ga.) 303; Dougherty v. Jones, 37 Ga. 348.

[3] Dougherty v. Jones, 37 Ga. 348; Bruns v Stewart Manufacturing Co. 31 Hun, 195.

[4] Howard v. Lowell Machine Co. 75 Ga. 325.

[5] N. Y. Laws of 1883, ch. 378, section 7 (re-enacting Laws of 1882, ch. 331, section 3, and amending Laws of 1890, ch. 537, section 3). The provision of this section is as follows: "The attorney-general may, at any time he deems that the interests of the stockholders, creditors, policyholders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district, for an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or to compel him to account, or for such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and any appeal from any order made upon any motion under this section shall be to the general term of said court of the department in which such motion is made."

[6] Attrill v. Rockaway Beach Improvement Co. 25 Hun, 376, 381. This was where the receiver had been appointed under subdivision 4 of section 3 of chapter 151 of the Law of 1870.

statute to remove a receiver appointed in an action pending in another judicial district, it has no power, by implication, to appoint a successor, but that for that purpose the proceedings must be remitted to the district in which the action is pending.[1]

The court will entertain a motion for the removal of the receiver only on notice to all the parties, and it is not sufficient merely that there exist good and sufficient reasons for the removal; the order will be invalid if due notice were not served.[2] Accordingly, in New York, where a receiver was appointed in an action instituted by a stockholder and creditor to wind up the affairs of a corporation, it was held that the attorney-general could not move, under a permissive statute, for the removal of the receiver unless he served a notice of the motion upon all the parties who had appeared in the action, and that an order removing the receiver and making a new appointment upon service upon the receiver alone, is improper.[3] And, in another appeal in the same case, it was held that the receiver ought not to be removed unless notice of the application have been given to the plaintiff in the action in which the receiver was appointed.[4]

Upon the other hand, it has been held in Florida that, on a motion to remove a receiver, he is not entitled to be heard in opposition because he is merely an officer of the court and not a party in interest.[5] So, also, in England, the rule seems to be that, although the receiver is entitled to notice, he can not appear in the proceeding.[6] But in New York, on the contrary, it is expressly held that the purpose of the notice is to give the receiver an opportunity to appear and to be heard in his own defence.[7]

Section 781. **Causes for Vacating the Appointment — Laches.** — When a receiver has been appointed temporarily, or in an *ex parte* proceeding, or before answer, and it subsequently appears from the defendant's pleading or otherwise, that the appointment ought not to have been made, or that the complainant has presented no case for the intervention of a court of equity, it is proper that the

[1] Attrill v. Rockaway Beach Improvement Co. 25 Hun, 376, 381. By chapter 537 of the Laws of 1810, the court has, under certain circumstances, the power to remove a receiver appointed elsewhere.

[2] Daniell's Chan. Prac. 1614; Attorney-General v. Haberdasher's Society, 2 Jur. 915; Campbell v. Spratt, 5 N. Y. Weekly Dig. 25; Bruns v. Stuart Manufacturing Co. 31 Hun, 195.

[3] Attrill v. Rockaway Beach Improvement Co. 25 Hun, 509 (1881.)

[4] Attrill v. Rockaway Beach Improvement Co. 25 Hun, 376.

[5] L'Engle v. Florida Central Ry. Co. 14 Fla. 266.

[6] Herman v. Dunbar, 23 Beav. 313; Kerr on Receivers (2d London ed.) 191.

[7] Bruns v. Stuart Manufacturing Co. 31 Hun, 195.

receiver should be removed.[1] So where it is made to appear that there was no necessity for the appointment of the receiver, or where it is shown to the satisfaction of the court that all the usual grounds for the appointment — such as imminent danger to the property, fraud, insolvency, and the like — are wanting, the court will remove the receiver and restore the *status quo*.[2] But where a receiver enters in good faith upon the discharge of his duties, and the parties in interest acquiesce for a considerable time, their laches may be such as to defeat a subsequent application on their part looking to the removal of the receiver.[3]

After a lapse of two years the appointment of a receiver will not be vacated on motion of one of the partners, when the latter knew at the time of the appointment of the facts on which the motion is based, but did not oppose the appointment, and the receiver during all the time has been discharging his duties and expended large sums of money therein.[4]

Section 782. **Of Appeals from the Order of Removal.**—In as much as the appointment and removal of a receiver are matters which rest essentially in the discretion of the court, it is a general rule that a court of appeal will not review the questions which have been passed upon by a lower court in relation thereto, and the rule is the same whether the one party or the other — the party of the receiver or the party opposed — attempts to prosecute the appeal. Thus, in Illinois a writ of error will not lie to reverse a decree removing a receiver, although the decree gave the defendant in error possession of the property, such defendant having been required by the same decree to give a bond and security and to hold all moneys which might come into his hands subject to the final decree which should be rendered in the cause, upon the ground that, when the original bill came on to be heard on the merits and a final decree settling the rights of all the parties concerned had been rendered, it would then be ample time, if the decree were erroneous, for either party to appeal or sue

[1] Voshell v. Hynson, 26 Md. 83; Drury v. Roberts, 2 Md. Ch. 157.

[2] Crawford v. Ross, 39 Ga. 44.

[3] Allen v. Dallas & Wichita R. R. Co. 3 Woods, 316, where the application was denied, because the receiver had been appointed over a railway and had made large disbursements in completing the road before the application was made. See also Bank of Monroe v. Schermerhorn, Clarke Ch. (N. Y.) 366 (1840).

The use of the word "remove" in the cases cited is a misnomer. The causes stated for the motion are those for vacating the order of appointment.

[4] Hardt v. Levy, 29 N. Y. S. 873.

out a writ of error.[1] And where no appeal was taken from an order appointing a receiver, but the defendants, after filing their answer, moved to rescind the order of appointment, and subsequently the court made an order refusing to rescind, whereupon the defendants appealed, and it was held that neither the appointment nor the refusal to discharge the receiver before final decree, involved the determination of any right between the parties and were not appealable under the code of Maryland.[2]

In New York the appellate branch of the lower courts has the power to review all matters of discretion, but the court of appeals has no such authority. Hence, an order refusing to remove a receiver, involving a matter addressed to the discretion of the court is reviewable by the former, but not by the latter.[3] It is, moreover, generally held that the receiver, being an officer of the court, has no right to ask for a review of the order removing him any more than a stranger to the cause, unless he be a party to the action in which he was appointed.[4] In Michigan an appeal may be taken by a creditor from an order denying a motion to remove a receiver.[5]

Section 783. **Of the Removal of the Receiver upon His Own Application.**— It is not, in general, the policy of courts of chancery to remove a receiver upon his own application after he has once accepted the office and entered upon the discharge of his duties. This is the rule partly because of the unwillingness of the court to charge the estate with the expense of such a proceeding and partly because it is contrary to the theory upon which justice is administered in a court of equity to allow changes of this nature which necessarily cause delay in collecting and settling the affairs of the estate affected by the receivership. It may be laid down, therefore, as a settled rule that the court will not remove or discharge a receiver except where good cause therefor can be shown, and it seems also that generally this must be something arising subse-

[1] Farson v. Gorham, 4 West. Rep. 111 (Sup. Ct. Ill. 1886).

[2] Hull v. Caughy, 5 Cent. Rep. 567, (Md. 1886).

[3] Connolly v. Kretz, 78 N. Y. 620. *Cf.* Dollard v. Taylor, 33 N. Y. Super. Ct. 496. In Siney v. New York Consolidated Stage Co. 28 How. Pr. 481; s. c. 18 Abb. Pr. 435, it was held that the order was not appealable.

[4] Connor v. Belden, 8 Daly (N. Y.) 257. While this rule is unquestionably laid down in this case, it still remains true that in New York receivers have often prosecuted appeals in these cases without objection. Thus, e. g., both in Wilson v. Barney, 5 Hun, 257, and in Connolly v. Kretz, 78 N. Y. 620, the appeal was taken by the receiver, and the regularity of the proceeding was not questioned.

[5] First National Bank v. Barnum Wire & Iron Works, 60 Mich. 487.

quently to the acceptance of the office.[1] Accordingly, where the receiver accepted the office at the request of the defendant, and was subsequently incapacitated from performing the duties of his office by reason of blindness, he was discharged upon his own petition;[2] but where the motion for relief was based upon the fact that the duties of the receivership interfered with the receiver's own private business, the application was refused.[3] And where the receiver had presented a petition to the court of bankruptcy and had compromised the debts with the approval of the court, and then moved to be allowed to pass his accounts as receiver and be discharged, the motion was granted.[4] But a receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the court would make the order on further directions without such petition.[5]

But a receiver may resign at any time.[6] No one can be compelled to fill the office against his will.

Section 784. **Of the Removal of the Receiver for Misconduct.**— The rule that a receiver may be removed for misconduct or breach of trust arises out of the nature of the office and the supervisory power of the court of chancery. Whenever the receiver is guilty of misfeasance or malfeasance in office it is the duty of the court to call him to account and, in a proper case, it has the undoubted right to order a summary removal. This is the settled practice. Accord-

[1] Richardson v. Ward, 6 Madd. Ch. 266; Beers v. Chelsea Bank, 4 Edw. Ch. 277; *In re* Lyle, 2 Paige, 251; Smith v. Vaughn, Cas. *temp.* Hardw. 251.

[2] Richardson v. Ward, 6 Madd. Ch. 266, where the receiver was allowed the costs of the proceeding.

[3] Beers v. Chelsea Bank, 4 Edw. Ch. 277. The petition in this case showed that nearly all the property which had come into the receiver's hands had been disposed of, that the proceeds had been distributed under the order of the court, that it would take much time and labor and probably require a long and protracted investigation, in consequence of the complicated nature of the accounts of the defendant, to close its affairs and those of the receiver, that the receiver, in consequence of the pressure of other business engagements, and because he was wholly unable to obtain from the books a full knowledge of its transactions, and consequently could not close the bank's business advantageously and that it was desirable, and for the benefit and interest of the defendant, that another receiver be appointed.

[4] Ellard v. Cooper, 17 Ir. Ch. (N. S.) 15. Mr. Edwards says: "In a case within the writer's own practice (Purdy v. Rapalye, 1835), the receiver wanted to go to Europe on his own affairs and remain a year, and the chancellor on a petition allowed him to pass his accounts, be discharged, have his recognizance vacated, a new receiver appointed and gave him his costs of being discharged." Edwards on Receivers, 661.

[5] Stilwell v. Mellersh, 5 Eng. L. & Eq. 185. *Cf.* Gilbert v. Whitmarsh, 2 Madd. Ch. Pr. (4th Amer. Ed.) 240 (1818).

[6] Hegewisch v. Silver, 140 N. Y. 41[illegible]

ingly, where it appeared that a receiver of a railway company had been guilty of an unjust and inequitable discrimination in freight rates as between the shippers of similar product over his road, and that he was continuing the discrimination by advice of counsel, the court upon the petition of an aggrieved party ordered his removal summarily.[1]

[1] Handy v. Cleveland & Marietta R. R, Co. (Circ. Ct. U. S. South. Dist. of Ohio, 1886) 2 Ry. & Corp. L. J. 200 (Baxter, J.). In this case it appears that the receiver, upon taking charge of the property, found that there existed a verbal contract between a certain large shipper and the traffic manager of the road, in pursuance of which that shipper was charged ten cents per barrel for the transportation of his product over the line of the road, while all other shippers of similar freight were charged thirty cents, the excess of twenty-five cents upon such other shipments, being paid over in cash to the larger shipper as a rebate. This contract the receiver was called upon to carry out, and, upon the advice of counsel, he did so. Upon suit brought by one of the shippers against whom the discrimination was made, the facts were disclosed, and the court, in a caustic opinion ordered the removal of the receiver, saying: "May a receiver of a court, in the management of a railroad, thus discriminate between parties having equal claim upon him, because thereby he can accumulate money for the litigants? It has been repeatedly adjudged that he can not legally do so. Railroads are constructed for the common and equal benefit of all persons who wish to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation of individuals owning them, and to that extent private property, they are by law and consent of the owner dedicated to the public use. By its charter and the general cotemporaneous laws of the state, which constitute the contract between the public and the railroad company, the state, in consideration of the undertaking of the corporators to build, equip, and keep in repair, and operate said road for the public accommodation, authorized it to demand reasonable compensation from every one availing himself of its facilities for the service rendered. But this franchise carried with it other and correlative obligations. All unjust discriminations are in violation of sound public policy, and are forbidden by law. Among these is the obligation to carry for every person offering business under like circumstances, at the same rate. We have had frequent occasions to enunciate and enforce this doctrine in the past few years. If it were not so the managers of railways, in collusion with others in command of large capital, could control the business of the country, at least to the extent that the business was dependent on railroad transportation for its success, and make and unmake the fortunes of men at will. The idea is justly abhorrent to all fair minds. No such dangerous power can be tolerated. Except in the mode of using them, every citizen has the same right to demand the service of railroads on equal terms, that they have to the use of a public highway, or the government mails. And hence, when in the vicissitudes of business, a railroad corporation becomes insolvent and is seized by a court, and placed in the hands of a receiver, to be by him operated pending the litigation, and until the rights of the litigants can be judicially ascertained and declared, the court is as much bound to protect the public interests therein as it is to protect and enforce the rights of the mortgagors and mortgagees. But after the receiver has performed all the obligations due the public, and to every member of it, that

But the fact that a receiver appointed in proceedings supplemental to execution, employs the defendant to make collections for him of a portion of the assigned demands, is not a ground for removal, where the receiver is personally responsible and his security ample, and no part of the funds are used for the benefit of the assignor.[1] And while, as has already been shown, it is generally improper for the receiver to retain the counsel of any of the parties to the cause, still the fact that he does so, is not, in the absence of collusion, a sufficient ground for the removal of the receiver after he had entered upon the discharge of his duties, especially where such a course has been acquiesced in by the parties concerned.[2] And where a court has removed trustees appointed by will to manage an estate, for mismanagement, and, pending the appointment of their successors, has placed the property in the hands of a receiver, it may remove such receiver in its discretion, and appoint proper

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is to say, after carrying passengers and freight offered, for a reasonable compensation not exceeding the maximum authorized by law, if such maximum rates shall have been prescribed upon equal terms to all — he may make for the litigants as much money as the road thus managed is capable of earning. But all attempts to accumulate money for the benefit of the corporators or their creditors, by making one shipper pay tribute to his rival in business at the rate of twenty-five dollars per day, or any greater or less sum, thereby enriching one and impoverishing another, is a gross, illegal and inexcusable abuse of a public trust that calls for the severest reprehension. The discrimination complained of in this case is so wanton and oppressive it could hardly have been accepted by an honest man having due regard for the rights of others, or conceded by a just and competent receiver who comprehended the nature and responsibility of his office, and a judge who would tolerate such a wrong, or retain a receiver capable of perpetrating it, ought to be impeached and degraded from his position. A good deal more might be said in condemnation of the unparalleled wrong complained of, but we forbear. The receiver will be removed. The matter will be referred to a master to ascertain and report the amount that has been, as aforesaid, unlawfully exacted by the receiver from R., which sum, when ascertained, will be repaid to him. The master will also inquire and report whether any part of the money collected by the receiver from R. has been paid to the Standard Oil Company, and if so, how much, to the end that, if any such payments have been made, suit may be instituted for its recovery."

[1] Ross v. Bridge, 15 Abb. Pr. 150; s. c. 24 How. Pr. 163. It was not suggested in this case that the appointment was collusive or for the purpose of protecting the debtor's property from other creditors, and the court held that the employment of the insolvent in this instance was a judicious exercise of the receiver's powers. The plaintiff could, as of course, call the receiver to account at any time.

[2] Bank of Monroe v. Scherrnerhorn, Clarke Ch. (N. Y.) 366. Another ground on account of which the removal was urged in this case, was the insufficiency of the receiver's bond, but there being no suggestion of insolvency or irresponsibility, or bad faith on the part of the receiver, this objection was held invalid upon the theory that, if proper, the security might be increased.

persons to take charge of and manage the property as trustees under the terms and conditions of the will; but it can not declare void a lease of a portion of the property made by such receiver in good faith, in accordance with the provisions of the will and in the interest of the beneficiaries therein named.[1]

Where all the creditors excepting the complaining one desire the retention of the receiver, a motion to remove him will be denied.[2] It has been held to be no ground for removal of receivers of a mortgage company that they were acting as selling agents of trustees of mortgages executed by the company to secure its debentures; nor that they had become members of a reorganization committee. But where a conflict over the plan of reorganization is foreshadowed, the receiver will be required to retire from membership of the committee.[3]

Section 785. **Of Removal in the Case of a Fraudulent or Collusive Appointment.** — It is, as of course, an elementary proposition that a court of equity will not sanction or continue a receivership which has been created collusively or fraudulently, and that a receiver so appointed will be removed upon proof that the appointment was made by collusion between the parties, or in fraud of the rights of any of the parties in interest. Thus, in New York, in a leading case, where the plaintiff's attorney obtained an order to show cause why a receiver of certain property should not be appointed, and upon the return day the proceedings were adjourned upon an understanding that no further steps should be taken until the defendant had been duly served with certain papers, and pending also negotiations for the abandonment of the action, it was held that a receiver subsequently appointed without notice to the defendant and in violation of the agreement made at the adjournment, was fraudulent, and, upon the defendant's motion, the order of appointment was set aside, the court saying: "It is sufficiently apparent that the entry of the order under the circumstances * * * was an abuse of the proceedings which can not be disregarded, and for which he (the receiver) should be held responsible. It constituted him an intruder and a trespasser upon the rights of the parties. * * * Fraud vitiates all contracts, and a judgment or order thus obtained binds neither the court nor the parties. It avoids even all judicial acts. The receiver having ob-

[1] Bayly v. Gaines, 2 South East. Rep. 739 (Va. 1887). *Cf.* Davis v. Snead, 33 Gratt. 710; Koontz v. Northern Bank, 16 Wall. 202.

[2] First Nat. Bank v. Barnum Wire & Iron Works, 60 Mich. 487.

[3] Fowler v. Jarvis-Conklin Mortgage Co. 63 Fed. R. 888.

tained control of the moneys, when it was entirely unnecessary to protect them, and in opposition to the wishes of the parties in interest, and by means which can not be justified or excused, thus subjecting them to large charges and expenses, there is no reason why he should not be held to a strict accountability, or that he should be allowed for any of the expenses incurred."[1]

In another case, a trustee of a corporation was appointed receiver thereof by a judge in New York county, at a special term, in an action by the trustees for an accounting and for the appointment of a receiver; subsequently a similar action was commenced in Albany county by a stockholder on behalf of himself and others, and also to secure redress for certain alleged frauds and breaches of duty on the part of the trustees for which they were personally liable. The court, at a special term, upon the application of the complainant, removed the first receiver and appointed another, directing the former to deliver up, transfer and convey to its appointee all property in his hands or under his control belonging to the corporation. The receiver first appointed thereupon moved the special term in New York county for an injunction perpetually restraining the second receiver from interfering with him as receiver; this motion was denied and, upon an appeal by the receiver, the judgment was affirmed, the court saying: "A collusive or fraudulent proceeding, even though judicial in its nature, can not be maintained, but it may be assailed and disregarded whenever and wherever it may be brought into question."[2]

Section 786. **Of Removal on Account of the Disagreement of Joint Receivers.**—The general doctrine as to removal upon account of disputes between joint receivers has been thus stated: "The mere fact that joint receivers are not able to agree as to the manner in which the trust should be managed, is not a ground for removal unless the estate will suffer on account thereof."[3] But where two

[1] O'Mahoney v. Belmont, 62 N. Y. 133, 144 (Miller, J.) affirming s. c. 37 N. Y. Super. Ct. 223. *Cf.* Bowery Bank Case, 5 Abb. Pr. 415; Matter of Nat. Mechanics' Banking Association v. Mariposa Co. 60 Barb. 423.

[2] Wilson v. Barney, 5 Hun, 257 (Daniels, J.), where the receiver was removed because the court was satisfied that the appointment was "collusive and friendly to avoid the judgment." This case is also authority for the proposition, that in New York, the court sitting in one department, has power to revoke the appointment of a receiver made by a different judge in another department on the ground of collusion. Upon this point see Attrill v. Rockaway Beach Improvement Co. 25 Hun, 376.

[3] Conner v. Belden, 8 Daly (N. Y.), 257, where the reasons of the disagreement were incompatibility of temper and conflicting interests.

receivers were appointed to manage a railroad, by an agreement between the parties representing two different classes of bondholders, upon the theory that, in as much as the parties, both plaintiffs and defendants, were acting in perfect harmony, the different interests should be represented and protected by different receivers, but such interests afterward became hostile, giving rise to dissensions and involving unnecessary expense, it was held that both receivers should be removed and a single disinterested receiver appointed, the court saying: "While a court may very properly conform its action in such a matter to the wishes of all the parties interested in the suit, when their wishes harmonize, it must consider for itself what is proper to be done when that harmony is turned into hostility, so that the two receivers represent two hostile camps, each intent upon securing the whole or the larger share of the spoils. It then becomes the duty of the court to see that its powers are exercised on principles of strict neutrality as regards the belligerents, and this can only be done in this case by removing the representatives of these hostile interests and appointing a receiver who, in feeling and in conduct, will be strictly neutral and strictly honest"[1]

Section 787. **Of Removal on Account of Relationship.**— It being fundamental that the receiver ought to be disinterested, unbiased and unprejuced as between the parties, because only in this way can he properly administer the trust, it follows that, in general, no relative of either of the parties ought to be selected as receiver. But where such a person has been appointed, he should not be removed unless some bias on his part be shown. Thus, where a brother-in-law of the plaintiff had been appointed, being every way qualified for the duties of the office, and had given abundant security, in view of the fact that his appointment had been requested by a considerable majority of the creditors interested in the property, a motion to remove him, no partiality or bias being shown, was denied.[2] But, upon the other hand, where it appeared that the person appointed was a brother of the plaintiff and the son of another person who was a creditor to a large amount, and that he had already acted as the agent of the plaintiff in the litigation, the court removed him on account of his presumed bias.[3]

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[1] Meier v. Kansas Pacific R. R. Co. 5 Dill. 476, per Miller, J.

[2] Wetter v. Schlieper, 7 Abb. Pr. 92, where the action was for the dissolution of a copartnership.

[3] Williamson v. Wilson, 1 Bland (Md.) 418.

And, in another somewhat similar case, where a brother of the complainant had been appointed receiver, and the defendant, a bankrupt, who had admitted that he had been a party to a fraudulent transfer and concealment of his property, moved to vacate the appointment, the court pertinently said: "He is not, and ought not to be indifferent between the parties. His duties require him to be the active adversary of this fraudulent debtor and his accomplices. In the selection of a person to discharge these duties, the respondent, in the position he now occupies, should have no voice, any more than the criminal should have in the choice of a detective to ferret out and recover the fruits of his crime. A person, therefore, who, by relationship or other connection, may be supposed to feel in some degree the desire felt by the complainant to collect the sum decreed to be due, would seem, if otherwise unobjectionable, to be eminently fit to be appointed a receiver in a case like the present."[1]

Section 788. **Of the Removal of a Receiver Appointed by Consent.**—Where the defendants in an action in which an application for a receiver is made, agree that the complainants, upon giving certain specified security, shall have the possession and management of the property and may name the receiver, such an agreement, it is held, places them in an attitude toward that officer which is somewhat different from that which they would occupy if he were appointed by the court in the ordinary way. Accordingly, they can not then object to the person of the receiver unless he commits some overt act of unfaithfulness to his trust which can be specified and pointed out, nor can they, as complainants, thereafter attack the previous transactions of the receiver, with a view to show that he has theretofore acted in respect to the trust in a manner which exposes him to censure.[2]

Section 789. **Of an Extension of the Receivership.**—As a general rule, a receiver appointed in a prior suit should not be displaced by the appointment of a receiver of the same subject-matter by the same court in a subsequent proceeding, but the receivership in the first suit should be extended to the second, subject to the legal and equitable claims of all parties; and the rights of the parties in each suit are then substantially the same as if different persons had been appointed at the several times when such receiverships were

[1] Shainwald v. Lewis, 8 Fed. Rep. 878, 879 (Hoffman, D. J.).

[2] Cowdrey v. Railroad Co. 1 Woods, 331. In this case the defendants failed to show any want of faithfulness on the part of the receiver, and, according to the doctrine of the text, their motion for his removal was denied.

granted. If, however, a different receiver be appointed, then, if the court have jurisdistion of the subject-matter and of the parties, and is the same court which made the first appointment, the receiver in the first suit must deliver the property to the receiver appointed in the second.[1] And where various creditors have obtained several receivers of the same estate, it is proper for the court, in order to save expenses and simplify the procedure, to remove all but one of the receivers, whose receivership should be extended so as to do justice to all the parties.[2]

Section 790. **Of the Substitution of a Receiver Selected by the Parties.**—It is an established rule in courts of equity that a receiver will not be arbitrarily removed and another person substituted in his place, in the absence of a substantial ground and merely because certain parties in interest desire it. And this is the rule even as against a creditor who has the right to nominate a receiver to collect the rents of an estate and to apply them to his claim.[3] But it seems that, notwithstanding this rule, the court may, in a peculiar case, if it sees fit, substitute a receiver so selected.[4]

Section 791. **Of the Rule Where a Party in Interest Has Been Appointed Receiver.**— In a case in New York coming up before the vice-chancellor upon a motion, *ex parte*, to remove a receiver upon the ground, *inter alia*, that the person appointed was a stockholder and director in one of the corporations complainant, the court, after an exhaustive consideration of the questions involved, reached the following conclusion: "There are many cases where this rule [that a party interested should not be made receiver] is made to bend to the exigencies of the particular case; and in such cases it has been usual to embody it in the order, that the party or person interested may be proposed as a receiver. * * * The only question which can admit of any doubt here is, whether the defendant has not, by his neglect to attend upon the master's summons, and his silent acquiescence in the appointment, given it his virtual sanction. * * * But I consider it a dangerous precedent to permit the, in fact, *ex parte* appointment of a party as a receiver. * * * I can not but foresee that, in this case, it

[1] State of Florida v. Jacksonville, P. & M. R. R. Co. 15 Fla. 201, 275.

[2] Kelly v. Rutledge, 8 Ir. Eq. 228.

[3] Sanders v. Lord Lisle, Ir. Rep. 4 Eq. 43. In this case the motion was made on behalf of certain incumbrancers in a pending suit brought against the grantor of the incumbrance by a junior incumbrancer.

[4] Farran v. Morris, 1 Ir. Ch. (N. S.) 680.

will probably be injurious to the interests of all these parties to remove the present receiver and appoint another. The present receiver has spent a great deal of time, has made himself familiar with the property entrusted to his care, and has acquired an information in relation to it, and its complicated details, and the circumstances of the numerous tenants, which a new receiver would be some time in acquiring. Neither is there any objection to his fidelity, responsibility, or fitness for the office, or any complaint of an improper exercise of its powers, or an improper discharge of its duties. But, as before remarked, it would be a dangerous precedent to continue him without giving the opposite party an opportunity to make their objections before the master. * * * I shall order that * * * it be referred again to the same master to appoint a receiver in these cases, * * * with liberty to the complainants to propose the same receiver already appointed. In the meantime * * * the present receiver is to continue in the discharge of his duties."[1]

II.

Discharge of Receivers.

Section 792. **Generally of the Discharge of Receivers.**— It has already been suggested that the essential distinction between the removal and the discharge of the receiver consists in that, in the one case, the receivership continues, the receiver himself being changed, while in the other the receivership is terminated and the receiver finally relieved from the obligations of his office. It is the law peculiar to the discharge of the receiver to which attention is now to be called.

It may be stated at the outset that the final discharge of the receiver, like his appointment or removal, is, in general, a matter which addresses itself to the discretion of the court. It is not, therefore, usually a matter of right. It is also the rule that the court to which the application for an order of discharge must be made, is the court of which the receiver is an officer.[2]

Where, in an action pending in a state court, a receiver has been

[1] Bank of Monroe v. Schermerhorn, Clarke Ch. 366, 369. See, also, Lafayette Bank v. Buckingham, 12 Ohio St. 419; State v. Claypool, 13 Id. 14, as to the removal of receivers of insolvent banks under the statutes of Ohio.

In Farmers' Loan & Trust Co. v. Northern Pacific Railroad Co. 61 Fed. R. 546, motion to remove former receiver who had been an officer of the company was denied. Same held in Fowler v. Jarvis-Conklin Mortgage Co. 63 Fed. R. 888.

[2] See Section 779.

appointed and then, before any motion to discharge has been made, the case is moved into the United States court, the motion for the discharge may be made in that court at any time after the record is filed.[1] It has been held that failure to serve a notice of motion for a discharge of the receiver is an irregularity not affecting the merits of the motion, and, accordingly, not of sufficient importance to justify the reversal, upon appeal, of an order discharging the receiver.[2] In England, if the balance in the hands of the receiver on the accounting prior to his discharge, be directed to be paid into court, the same order may direct his recognizances to be vacated; but, if it be directed to be paid in any other manner, a second petition is necessary.[3] Under the English practice the receiver is not entitled to a hearing on a motion for his discharge, the reason being that he is an officer of the court and not interested in the appointment except to carry out the duties of the office in an impartial manner.[4] And a plaintiff who has procured the appointment of a receiver can not dismiss his bill and have the receiver discharged without first requiring him to pass his accounts.[5] The trusteeship of the receiver, however, will cease upon his discharge and the payment or delivery over by him of the property in his hands pursuant to the order of the court appointing him.[6]

The receiver has no more right to object to his discharge than he had originally to insist upon his appointment. It is neither his privilege nor right to appear and make any contest in the proceedings, except for the purpose of protecting his individual rights, and those of his bondsmen.[7] But a receiver will not be discharged until he shall have had an opportunity of submitting his accounts and being allowed compensation.[8] It has been adjudged that a court should never surrender its custody of the property or discharge the receiver until all claims incurred by the receiver in the proper discharge of his duties have been adjusted and provided for.[9]

Section 793. **Of Appeals Herein.**— In as much as the application for the discharge of the receiver can lawfully be made either by the plaintiff, the defendant, a third party or the receiver himself, it fol-

[1] Texas & St. Louis Ry. Co. v. Rust, 17 Fed. Rep. 275, citing Dillon on Removals, section 80, p. 99; Mahoney Mining Co. v. Bennett, 4 Sawyer, 289.

[2] Coburn v. Ames, 57 Cal. 201.

[3] Lawson v. Ricketts, 11 Beav. 627.

[4] Herman v. Dunbar, 23 Beav. 312.

[5] White v. Lord Westmeath, 2 Hog. 33.

[6] Hovey v. Elliott, 53 N. Y. Super. Ct. 331.

[7] Hoffman v. Bank of Minot (N. D.), 61 N. W. R. 1031.

[8] Id.

[9] Thornton v. Highland Ave. & Belt Railroad Co. 10 So. R. 442.

lows that the effect of the order which is made upon the determination of the motion, may be such as to justify an appeal either upon behalf of the parties urging, or of those opposing the discharge. Accordingly, the right of appeal in these cases being a matter regulated almost entirely by the local rules of procedure, no general doctrine of universal application can be formulated. In Michigan it is held that, where an order is made directing the receiver to pass his accounts and that thereupon he be discharged, and providing for the distribution of the property in his hands and for the relief of his bondsmen, there can be no appeal.[1] And in Maryland it is held that a party to the cause can not appeal, upon the theory that the discharge does not affect the rights of any of the parties, and that the possession of the receiver is that of the court whose officer he is;[2] nor can the receiver himself appeal from the order discharging him, since he has no personal rights or interests in the controversy, and as the officer of the court is subject, at every step, to the direction and control of the court;[3] and where the court has made such an order, and the receiver moves for an appeal and has filed a bond, the court will, nevertheless, proceed in the carrying out of the order, and if the receiver does not comply therewith, it may punish him for contempt.[4]

Section 794. **Who May Apply for the Discharge of the Receiver.**— Although every person who considers himself aggrieved by the appointment of a receiver, has, in general, the right to relief in case it can be shown that the receivership is unauthorized, it is nevertheless the rule that the proper form of relief is not necessarily a direct and immediate application to the court for the discharge of the receiver. It is, therefore, a matter of moment to determine who may properly make a motion for discharge. Thus it has been held that, where a receiver has been appointed in an action to enforce a trust contained in a will, and as such receiver has taken possession of certain lands covered by a mortgage, the mortgagee, although not a party to the suit, may apply for the discharge;[5] and there

[1] Colgate v. Michigan Lake Shore Ry. Co. 28 Mich. 288.

[2] Washington City & Point Lookout R. R. Co. v. Southern Maryland R. R. Co. 55 Md. 153.

[3] Ellicott v. Warford, 4 Md. 80. In this case the committee of a lunatic was appointed receiver of his estate on his death, and was discharged on the appointment of an administrator, but it is to be observed that the chancellor in making the appointment reserved the power to change or annul the order.

[4] *In re* Colvin, 3 Md. Ch. 300; Baughman v. Superior Court, 14 Pac. Rep. 207. Ireland v. Nichols, 9 Abb. Pr. (N. S.) 71

[5] Thomas v. Brigstocke, 4 Russ. 64. It is to be observed, as to this case, that.

seems to be no doubt that a defendant to the action in which the receiver is appointed, has the right to move, *pendente lite*, for the discharge of the receiver, without regard to the question whether the appointment had been opposed or not.[1]

The general ground upon which the application is based must always be the satisfaction of the plaintiff's claim. The payment of the judgment and its satisfaction of record after the appointment of a receiver in supplementary proceedings does not, however, *ipso facto*, operate to discharge the receiver, but the debtor may obtain an order of discharge upon payment of his lawful charges.[2] In such a case the granting of the order of discharge is not a matter of discretion, but its refusal is error which may be reversed on appeal.[3] The question is sometimes complicated by the rights of third persons who are parties to the action, and it is a matter to be determined by the view which the court takes upon the question whether the receiver, being appointed on the application of one of the parties to the cause, can be treated as acting for the benefit of all; and, further, with reference to the question whether the receivership will be continued even though the party on whose application the receiver was appointed consents to the discharge. In an English case, where a receiver was appointed in behalf of an equitable incumbrancer of the property of one of several defendants, and subsequently, the claim which the receiver represented being satisfied, application was made for his discharge, which proceeding was opposed by other defendants who claimed to have annuities or incumbrances on the same property, the court held that the receiver ought to be discharged, and that the rights of the other parties should fall with that of the plaintiff.[4] Other courts do not recognize this rule, but, upon the contrary, hold that a receiver is appointed for the benefit of all the parties, and that he will not be discharged if such a proceeding will operate to prejudice the rights of other parties to the action.[5] Thus where a legatee, in a suit to

under the English law a mortgagee was entitled to the immediate possession of the mortgaged premises, and that, if a receiver were appointed, any steps taken to obtain possession without leave of the court would constitute a contempt, even though the possession of the receiver were wrongful; hence, such an application as this would be the only relief in this class of cases.

[1] Grenfell v. Dean and Canons of Windsor, 2 Beav. 544.

[2] Crook v. Findley, 60 How. Pr. 375. *Cf.* Sewell v. Cape May & Sewell's Point R. R. Co. 9 Atl. Rep. 785.

[3] Milwaukee & Minnesota R. R. Co. v. Soutter, 2 Wall. 510.

[4] Davis v. Duke of Marlborough, 2 Swanst. 168 (per Lord Eldon).

[5] Lenoir v. Linville Improvement Co. 23 S. E. R. 442; Fay v. Erie & Kalamazoo R. R. Bank, Harring (Mich.), 194. In this case a creditor had obtained the appointment, and other creditors had

obtain satisfaction of his legacy, files a bill in behalf of himself and all other creditors and legatees who may come in, the receiver will not be discharged upon the motion of the plaintiff, against the consent of an incumbrancer who is a party defendant.[1]

Section 795. **Of the Grounds of the Discharge — (*a*) When the Appointment is Irregular.** — A court of equity, as of course, is always ready to rectify improper or irregular proceedings, and, where an application for a receiver has been allowed and it subsequently appears that the appointment was improper, the receiver will be discharged, or, more properly speaking, the order of appointment will be vacated. Thus, where a receiver was appointed of property which was owned by a person not a party to the action, and that fact was subsequently established to the satisfaction of the court, the receiver was discharged.[2] And where a receiver was appointed on an *ex parte* application, upon the ground that the defendant, being in possession, was selling and converting property held under a mortgage and was insolvent, and that there was imminent danger that the plaintiff would lose his debt, all of which allegations were fully denied by the answer, the receiver was discharged.[3] But, in a case in New Jersey, which arose under the statute of that state which provides that, when a company shall become insolvent, or shall suspend its business for want of funds to carry on the same, a receiver may be appointed, it was held, where the entire capital stock of a railroad company and more had been expended in building and equipping the road, and a considerable floating indebtedness had been incurred, and subsequently mortgage bonds to a much larger amount had been issued, but the indebtedness had not been liquidated or the interest on the bonds paid, that the company was insolvent within the meaning of the statute, and that the receiver already appointed would not be discharged and the possession of the road remanded to the company, until the admitted liabilities and the receiver's expenses were paid.[4]

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come in and filed their claims. The first, upon being paid, moved for the dismissal of his bill and the discharge of the receiver, which was refused. See also Bainbrigge v. Blair, 3 Beav. 421. If the receiver be not discharged, the court may require the defendants protected thereby to file a bill forthwith. Whiteside v. Prendergrast, 2 Barb. Ch. 471.

[1] Largan v. Bowen, 4 Schoales & L. Ch. 296, where the court took the ground that it would not have discharged the receiver even if the incumbrancer had not been a party but had been obliged to file a new bill.

[2] Lavender v. Lavender, Ir. Rep. 9 Eq. 593. In this case the action had abated by the death of a sole defendant, but this was held not to affect the discharge.

[3] Furlong v. Edwards, 3 Md. 99.

[4] Sewell v. Cape May & Sewell's Point R. R. Co. (Ct. of Ch. of N. J.

Section 796. (*b*) **When the Action Has Ended.**—An abatement of the cause does not, in general, determine the jurisdiction of a receiver, but his authority continues until an order is made for his discharge.[1] In accordance with the same general principle, where one of the complainants died, it was held that the receiver would not upon that account be discharged, but that a motion to revive should be made.[2]

The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not, *ipso facto*, effect his discharge, which results only from an order or decree of court so directing. After the settlement of the suit the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership; and for such purpose only should he be continued in office after a final decree in favor of the defendant,[3] unless there be an appeal.[4]

Property left in the hands of a receiver after the bill has been dismissed for want of jurisdiction must be returned to the party from whom it was taken, regardless of any claim that the opposite party may have thereon.[5] Such action ends the receivership and necessarily discharges the receiver. The functions of a receiver terminate with a judgment adverse to the party who procured his appointment, although his character as a receiver may continue for

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June, 1887), 9 Atl. Rep. 785, where the court said: "I think the foregoing facts bring the case within the seventieth section of the act respecting corporations * * * which declares that when a company shall become insolvent, or shall suspend its business for want of funds to carry on the same, a receiver may be appointed. And I also think that I am warranted in declaring that the defendant company is insolvent, under the rule laid down in National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 159, which declares, 'Insolvency means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs.'" *Cf.* Ferry v. Bank of Central New York, 15 How. Pr. 445; Ireland v. Nichols, 9 Abb. Pr. (N. S.) 71.

[1] Newman v. Mills, 2 Hog. 291; McCosker v. Brady, 1 Barb. Ch. 329.

[2] Woods v. Creaghe, 1 Hog. 174, where the defendant was in contempt for not answering, and the court said: "The plaintiff has acquired a right to a receiver, and obtained an effectual order in the cause for his appointment; that order still remains, and the plaintiff should have an opportunity of showing why he should not be deprived of the benefit of it. The order was made to enforce an answer from the defendant, which he has not yet filed. Had the receiver been appointed on the motion of a defendant who had died, the case would have been different." It was directed that the receiver be discharged unless the cause should be revived within ten days.

[3] Garniss v. Superior Court, 88 Cal. 413.

[4] Sections 116 and 117.

[5] Warren v. Bunch, 80 Ga. 124; Caswell v. Bunch, 7 S. E. R. 270.

the purpose of rendering his account, and until he is by order discharged from his trust. After judgment adverse to plaintiff the receiver can not commence an action in behalf of the estate which he represents.[1] The dismissal of the action does not discharge the receiver from accountability to the court which appointed him. He is an officer of the court and subject to its orders in relation to the property placed in his hands as receiver, until discharged by the court.[2]

Section 797. (*c*) **Where it is For the Interest of the Parties Concerned.**—In as much as the receiver is appointed upon the theory that thereby the interests of all the parties concerned will be the better subserved, protected and secured, it follows, as of course, that, whenever, at any stage of the litigation subsequent to the appointment, these interests will be promoted by the discharge of the receiver, it is the proper practice to move therefor. Thus, where a receiver of the property of a bank was appointed, with the consent of the management, on the ground of insolvency, and an application was subsequently made that the receiver be discharged, upon the ground that the bank had become solvent and that the rights of the creditors would be subserved, because their claims could then be immediately paid, it was held proper to discharge the receiver.[3] And, in another case, where the receiver had been appointed in a suit to dissolve a copartnership and for a settlement of the accounts, and the answer of the defendant denied the existence of a partnership, it also appearing that only a very small portion of the capital had been contributed by the plaintiff and that the effect of the receivership would be to arrest and probably ruin the business, it was held that the receiver ought to be discharged upon the application of the defendants and upon their undertaking to give security sufficient to protect the plaintiff.[4] So, also, where a receiver had been appointed because of the refusal of executors to act, and the receiver subsequently left the country, it being shown that the executors were then willing to act, the court instead of appointing a new receiver, ordered its receiver to account and directed the executors to act.[5]

Section 798. (*d*) **Laches.**— Upon the general ground that courts of equity discourage laches on the part of suitors, the discharge of a

[1] Colwell v. Garfield National Bank, 119 N. Y. 408.

[2] State v. Gibson, 31 Ark. 140.

[3] Ferry v. Bank of Central New York, 15 How. Pr. 445.

[4] Popper v. Scheider, 7 Abb. Pr. (N. S.) 56.

[5] Davy v. Gronow, 14 L. J. (N. S.) Ch. 184.

receiver may be refused — as has already been shown to be the case as regards the question of a removal of a receiver even for cause — where the moving party has been guilty of laches in applying for the discharge; and, upon the other hand, a receiver already appointed may be discharged in a case where the plaintiff is guilty of laches in proceeding with the cause, especially where his default affects injuriously the rights of other parties. Thus, where an application for a receiver was made, but the hearing thereupon was adjourned indefinitely and nothing was done for a year, but subsequently a receiver was appointed, and upon the same day, an order was made in another action appointing a second receiver of the same subject matter, a motion to set aside the order appointing the receiver in the earlier proceeding was granted.[1]

Section 799. (*e*) **When the Object of the Receivership is Attained.** — When the object for which the receiver is appointed has been attained, and the necessity for such equitable relief as the receivership affords has ceased, it is proper to discharge the receiver. Thus, where a receiver of the property of a decedent had been appointed pending the determination of the rights of various claimants thereto, upon the appointment of an administrator *pendente lite*, the receiver was discharged.[2] And a receiver of a railway appointed because of its failure to operate the road, may be discharged where the court is satisfied that the reason for a receivership no longer exists.[3] So also, where it is alleged that the receiver has been appointed over a larger estate than is necessary, the defendant may apply to the court for an investigation of that matter, and if such appear to be the case, the receiver ought to be discharged as to the

[1] National Mechanics' Banking Association v. Mariposa Co. 60 Barb. 423. In the earlier case the application was made in March, 1870, and after numerous adjournments, a stipulation was made in October, 1870, continuing the proceeding indefinitely. On May 13, 1871, the matter was brought up again, and adjourned by consent to the 18th, when a receiver was appointed. In the second case the notice of motion was served on May 11, 1871, and adjourned by consent to the 17th, when an order was made appointing a receiver, whose bond was approved on the 18th, and filed on the 20th. The court said that there was "no propriety in allowing one creditor to make a motion for a receiver, and, by stipulation with the attorneys for the defendant, to allow such proceedings to lie dormant for months, until other creditors proceed to collect their claims, and then, by consent of the attorney, attempt to gain a priority." The court also held that there was apparently collusion between the parties in the earlier case to defeat the claim of the plaintiff in the latter, and also that the actual appointment was earlier in the latter case.

[2] *In re* Colvin, 3 Md. Ch. 297.

[3] *In re* Long Branch & Sea Shore R. R. Co. 24 N. J. Eq. 398.

surplus.[1] And where trustees were removed on account of misconduct and a receiver appointed, the latter may be discharged upon the appointment of new trustees.[2] But a receiver of the estate of several infants, will not be discharged on the application of one who has reached his majority, until all have become of age;[3] and where application is made for the discharge of a receiver of a bank who had been appointed because of alleged insolvency, upon the ground that the appointment had been obtained by collusion and that the bank was not insolvent, no charges being made against the receiver personally, it is proper to refuse the application.[4]

Section 800. **Of the Effect of the Termination of the Litigation.** — If the controversy terminate favorably to the plaintiff or the party at whose instance the receiver was appointed, it will usually devolve upon him to carry out the decree of the court, according to the nature of the receivership and his powers under the decree. In some cases the receiver after judgment is deemed not to hold the property as receiver, but as trustee for the party found entitled thereto.[5] If, on the contrary, the result be favorable to the adverse party, the functions of the receiver are at an end, and it is proper to order him to account and be discharged. The determination of the suit, however, will not, *ipso facto*, discharge the receiver, but his functions must be terminated by a formal order of the court.[6] And where the decision upon a demurrer to the bill is favorable to the demurrant, the receiver should be directed to deliver over to the defendant all the property which he has collected.[7] But where the appointment of the receiver is ancillary to the main proceeding, the fact that the plaintiff, a demurrer to whose bill is sustained, has appealed, does not prevent the discharge of the receiver on motion;[8] so also, the fact that a stay of proceedings has been effected by the

[1] McGrath v. Veitch, 1 Hog. 110.

[2] Bainbridge v. Blair, 3 Beav. 421.

[3] Smith v. Lyster, 4 Beav. 227. The infant is generally allowed a year in which to examine the receiver's accounts, and the receiver should not be discharged before the lapse of that period. Matter of Van Horne, 7 Paige. 46; Wilbridge v. McKane, 2 Moll. 547.

[4] Bowery Bank Case, 5 Abb. Pr. 415, where the reasons given were that the appointment had not prejudiced the petitioner, and that the receiver, if an improper person, might be removed.

[5] Very v. Watkins, 23 How. 469.

[6] Keokuk Northern Line, etc., Co. v. Davidson. 13 Mo. App. 561; Whiteside v. Prendergast, 2 Barb. Ch. 471; Crook v. Findley, 60 How. Pr. 375; Ireland v. Nichols, 9 Abb. Pr. (N. S.) 71; s. c. 40 How. Pr. 85; Beverley v. Brooke, 4 Gratt. 220.

[7] Field v. Jones, 11 Ga. 413. *Cf.* Beverly v. Brooke, 4 Gratt. 220.

[8] Baughman v. Superior Court, 14 Pac. Rep. 207 (Cal. 1887); Ireland v. Nichols. 9 Abb. Pr. (N. S.) 71; *In re* Colvin, 3 Md. Ch. 300.

giving of security will not prevent the discharge.[1] And where the protection of the rights of a defendant requires the continuance of a receivership, the court will not grant a discharge although the suit is at an end; but it will require the defendant thus protected to file a bill forthwith, to establish his rights.[2] But where a receiver had rented lands to one of the parties to the action, and thereafter a decree was made which was claimed to be final, but did not in terms discharge the receiver and had not been fully executed, it was held that the receiver might apply for an order dispossessing the lessee and restoring the possession to him, in order that a new tenant might be put into possession.[3]

Section 801. **Of Discharge Because of a Change in the Status Quo.** — An injunction to put a purchaser into possession is, *ipso facto*, a discharge of the order appointing a receiver of the land in litigation and affected by the injunction,[4] and, in such a case, the recognizance of the receiver may be vacated on motion, although he have been formally discharged.[5] But where, in a suit by a receiver of a corporation, the defendant set up that, by an election of a new board of directors shortly after the appointment of the receiver, the corporation became vested with the right to continue the management of its affairs, that the powers of the court were exhausted and that the receiver had ceased to have any authority to prosecute any suit in behalf of the corporation, and the reply admitted the election but averred that no application had been made to the court by the directors to have the receiver discharged, it was held that the new election did not *ipso facto*, put an end to the office and authority of the receiver, although it might furnish ground for his removal on a proper application to the court that appointed him, the court saying: "The general rule of chancery practice is, that a receiver is never discharged by a decree, unless perhaps by a decree which disposes of the subject matter and leaves the receiver nothing to act upon; but the rule is, that an application for discharge must be made, notice of which should be given to all parties." [6]

In New York, the supreme court, in proceedings instituted by the attorney-general against an insolvent life insurance company under

[1] Ireland v. Nichols, 9 Abb. Pr. (N. S.) 71, where it was held that only those proceedings which are instituted for the purpose of enforcing the judgment are stayed.

[2] Whiteside v. Prendergrast, 2 Barb. Ch. 471.

[3] Visage v. Schofield, 60 Ga. 680. *Cf.* Beverley v. Brooke, 4 Gratt. 220.

[4] Ponsonby v. Ponsonby, 1 Hogan, 321.

[5] Anon, 2 Ir. Eq. 416.

[6] Keokuk Northern Line, etc., Co. v. Davidson, 18 Mo. App. 561, 567.

the provisions for such a proceeding in the Insurance Act of 1869,[1] has no power to discharge the receiver upon motion of the company and to order the restoration of the property to the corporate officers, but, where the actuary's report shows that the company is not able to go on with its business, the assets in the hands of the receiver must be turned into money, the liabilities paid and the corporate affairs closed up.[2] And after a receiver has been regularly appointed in an action to wind up an insurance company, the parties can not, by stipulation, effect the removal of the receiver, and undo what has been done.[3]

Section 802. **Effect of End of Receivership and Discharge of Receiver.**—When the powers and duties of a receiver are at an end, the property in his possession belongs to the party in whose favor judgment was rendered, who is entitled to it without further delay or order of the court.[4]

Where, pending proceedings against the receiver of a railroad company to compel him to pay the claim of a creditor out of the assets in his possession, the receiver was finally discharged and all the property, by direction of the court, was taken out of his hands, it was held that this was sufficient ground for denying the application; that the court had power to make the order discharging the receiver without notice to the petitioning creditors. "It would be a very singular proceeding," it was said, "to permit a creditor to litigate his claim with a person who was formerly receiver, but who ceased to be such, and who is no longer an officer or agent of the court, or subject to its control."[5]

It may be broadly asserted that the official liability of a receiver ends with his official existence.[6] Where, pending a suit against the receiver of a railroad company, he is discharged from the receivership before pleading, and the property is withdrawn from his

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[1] N. Y. Laws of 1869, ch. 902.

[2] Attorney-General v. Atlantic Mutual Life Ins. Co. 77 N. Y. 336, 340, affirming s. c. 15 Hun, 84, s. c. 56 How. Pr. 391.

[3] People v. Globe Mutual Life Ins. Co. 57 How. Pr. 481. As to the discontinuance of an action brought under the Laws of 1853, ch. 466, section 24, to wind up a fire insurance company, see *In re* Mechanics' Fire Ins. Co. 5 Abb. Pr. 444, and as to the statutory requirements in New York in point, *cf.* section 1788, Code Civil Pro.

[4] Garniss v. Superior Court, 88 Cal. 413.

[5] New York & Western Union Telegraph Co. v. Jewett, 115 N. Y. 166. *Contra*, Miller v. Loeb, 64 Barb. 454.

[6] Bond v. State, 9 So. R. 353; Houston & Texas Central Railway Co. v. Crawford (Tex.) 31 S. W. R. 176; Boggs v. Brown, 82 Tex. 41.

custody, no judgment can be rendered against him in his representative capacity, although, if intervening rights do not interfere, the cause may be revived by proper application against his successor.[1]

[1] Id. Personally a receiver is, of course, liable after as well as before his discharge. Where lands were fraudulently conveyed to the receiver of a railroad he could be required, in an action for fraud, to account and show the disposition of the lands and profits received from such land after his accounts had been approved and he had been discharged. Pondir v. N. Y., Lake Erie & Western R. R. Co. 25 N. Y. S. 560.

CHAPTER XXVI.

A SUMMARY OF THE LAW OF RECEIVERS — THE PRINCIPLES OF RECEIVERSHIPS AND RULES OF PRACTICE — PROCEDURE IN SECURING APPOINTMENT OF RECEIVER.

Section 803. Introductory — The Scope of this Chapter.
804. The Court Which May Grant the Remedy — Plaintiff Need Give No Bond.
805. When Another Suit Has Been Commenced — Right to Receiver.
806. Determining Whether the Facts are Sufficient to Invoke the Remedy.
807. Time When the Application May be Made.
808. The Application — The Pleading.
809. Notice of the Application.
810. The Affidavits in Support of the Application.
811. Of the Selection of a Receiver.
812. The Order of Appointment.
813. How the Receiver Qualifies — His Bond.
814. Moving to Vacate the Appointment.
815. The First Duty of the Receiver.
816. The Powers of the Receiver.
817. The Duties and Liability of the Receiver — His Personal Liability.
818. Of the Procedure by the Receiver before the Court.
819. Of the Procedure by Third Persons Having Claims Against the Receiver or Estate.
820. The Receiver's Compensation.
821. Of the Receiver's Accounts.
822. Of the Expenses of the Receivership.
823. Removal and Discharge of the Receiver.

Section 803. **Introductory — The Scope of this Chapter.** — It is proposed in this chapter to merely state, not to further discuss, the salient principles and rules of practice applicable to receivers and receivership proceedings; to summarize and recapitulate the subject of this treatise. We shall carefully and thoughtfully collate and announce succinctly, but clearly, such principles and rules, that they may be readily comprehended by the inexperienced practitioner, and also assist the bench and bar in receivership litigation.

Section 804. **The Court Which May Grant the Remedy — Plaintiff Need Give no Bond.** — The very first thought in considing the remedy by the appointment of a receiver is that it belongs exclusively to equitable jurisdiction, and can be granted only by a

court of chancery. As the proceeding is an ancillary or auxiliary remedy, resort to it is permitted only when there is a suit pending, and the proceeding is engrafted on and becomes a part of the main litigation. It must, of course, originate and remain in the same court where the suit is pending. It is not an independent action; but is as dependent on and as closely related to the main suit as is an attachment proceeding.

The application for a receiver must be made in the court of original jurisdiction; an appellate court cannot grant the remedy.

The appointment of a receiver may be made by the judge in vacation, as well as by the court while in session, and is made without requiring the plaintiff to give any bond.

Section 805. **When Another Suit Has Been Commenced — Right to Receiver.** — If a suit has been already commenced in a court of competent jurisdiction, affecting property, though a receiver has not been appointed, the commencement of another action against the same property will not give the plaintiff the right to have a receiver appointed over it; for, as between courts of concurrent jurisdiction, that one has exclusive power to draw the litigation wholly to itself and conduct it to the end which first had cognizance of the action. Questions of conflicts between courts in the seizure of property through receivers are determined by priority of time in the commencement of the suits, not in the appointment of receivers.

Section 806. **Determining Whether the Facts are Sufficient to Invoke the Remedy.** — Before proceeding to apply for the appointment of a receiver the careful practitioner will first determine whether the facts are such as to warrant the exercise of this extraordinary power of a court of chancery. It must be remembered that the remedy is a harsh and drastic one; that it will not be granted where another adequate remedy exists; that the power to appoint a receiver will be exercised with caution and circumspection, and only in extreme cases, when it clearly appears that to refuse the application would cause the complainant irreparable loss, and when the appointment could prevent "manifest wrong imminently impending." It must be very clearly shown that the plaintiff has some right, claim or interest in and to the property for which a receiver is asked, and that a receiver is necessary to save it from material injury and effect the purpose of the suit. It should be considered that the appointment of a receiver is not a matter of course, but rests in the sound discretion of the court; that the remedy is not

granted because of past, but present conditions, and a well founded apprehension of the future; and that in determining the application the primary inquiry will be whether there is shown a reasonable probability that the plaintiff will ultimately succeed in obtaining the relief sought in the suit.

Section 807. **Time When the Application May be Made.** — Having determined to apply for the appointment of a receiver, the time for presenting the application is next to be considered. As the appointment of a receiver will be made only as an incident to a pending suit, it necessarily follows that the application will be premature if made before the commencement of the action; or, more strictly speaking, before the filing of the bill, which, for the purpose of applying for a receiver, may be taken as the commencement of the suit. But whether the filing of the bill, or the issuance or service of process, is the commencement of the suit, is a local question.

When the suit has been commenced the right of the plaintiff to apply for a receiver exists and continues to the final adjudication of the cause; after as well as before appeal. The application may be made before the service of summons and the coming in of the answer, and at any stage of the litigation. The appointment may be made at chambers, in vacation, as well as by the court when in session.

Section 808. **The Application — The Pleading.** — If before the bill is filed it be decided to apply for a receiver, the practice is to set forth fully and sufficiently in the bill all the facts which are to be presented as warranting the exercise of this extraordinary power of the court. A separate pleading is not necessary; the bill may be made to answer the purpose of a complaint and an application for a receiver. The bill should contain allegations of facts which justify the appointment of a receiver. The defendant is entitled to know on what grounds a receiver for his property is sought.

If the bill has not been prepared with the intention of applying for a receiver, and after it has been filed it be desired to make the application, an amended bill or a separate pleading becomes necessary and is in order. The application is then made on facts additional to those alleged in the bill and the pleading must properly and sufficently show facts justifying the remedy sought.

It is the practice to verify the bill or application, but the omission may be supplied by affidavits. A receiver will not be appointed on a statement of facts not supported by oath, or on mere allegations of information and belief, when verified.

Section 809. **Notice of the Application.** — It is a wise and most rigid rule that an application for the appointment of a receiver will not be entertained unless reasonable notice thereof has been given to the defendant.

The rule has its exception, and there are conditions which dispense with its requirement. It should be a very urgent case, however, supported by strong affidavits, to justify the appointment of a receiver without notice and the dispossession of the owner of his presumptive right to control his property, with no bond to compensate him for its wrongful seizure.

Notice of the application will not be required where it is impossible to give it because of an absconding or non-resident defendant; or where to give it or to delay to give it would defeat the purpose of the application. The facts justifying an appointment without notice must be alleged and fortified by affidavits.

To justify the appointment of a receiver without notice there must be a strong case of pressing emergency, rendering immediate interference necessary.

Section 810. **The Affidavits in Support of the Application.** — The application for a receiver is to and should be founded on affidavits, copies of which should be served on the defendant; otherwise he will be entitled to time to file affidavits in denial.

It may be correctly stated that affidavits made on mere information and belief are insufficient, and will not warrant the appointment of a receiver. General statements in the affidavits will not suffice; they must be clear and specific, and be made fully and carefully. The affidavits must be sufficiently clear and positive to subject the affiant to the penalties of perjury.

A verified answer will serve the purpose of an affidavit; and when such an answer fully denies the allegations of the application, and the plaintiff does not fortify the application with an affidavit, it will be denied.

Section 811. **Of the Selection of a Receiver.** — If the application be granted, the selection of a person to be the receiver is the next matter for settlement.

It is the common practice for courts to defer much to the recommendation of the parties when they agree upon a person; in fact, the courts too often act upon the joint suggestion of the parties; it is frequently the case that they do not recommend the most suitable persons for the position of receiver.

The eligibility of one to serve as receiver is founded exclusively

on indifference and impartiality; and the appointment of one to the position who is not possessed of these essentials should not be suggested or appointed.

The selection of a receiver is a matter within the sound discretion of the court.

Section 812. **Of the Order of Appointment.** — The order of appointment is, as it were, the receiver's power of attorney; it confers and limits his powers. It will be found impracticable to so draft it as to empower the receiver to do all things necessary to the proper administration of the trust, and additional orders will have to be made from time to time to meet emergencies. But the order should be sufficiently broad and comprehensive to confer on the receiver full authority to seize the property in controversy, sufficiently describing it, and to do all things essential to its preservation. Whatever is omitted from the original order may be supplied by additional and supplemental orders.

It is the usual practice for the plaintiff's solicitor to draft the order and submit it to the defendant's solicitor for approval. The order should prescribe the amount of the receiver's bond.

Section 813. **How the Receiver Qualifies — His Bond.** — The essential, and in most jurisdictions the only requisite of qualification by the receiver, is giving the required bond. The practice in some jurisdictions requires the receiver to make oath as to the due and proper performance of his duties as an officer of the court.

A receiver has no power to enter upon the discharge of the duties of the position until he has complied with the order of the appointing court as to giving bond. The plaintiff is not required to give any bond, and the bond of the receiver is for the protection of all parties interested, so far as to account for the property seized or its proceeds. Until the bond has been given and duly approved, he cannot exercise any of the powers of the office, and to do so would subject him to personal liability.

Section 814. **Moving to Vacate the Appointment.** — After the appointment of a receiver the defendant may, though he resisted the application, and particularly if the appointment was *ex parte*, immediately move to vacate the order. The practice is to present a motion, in which is set forth specifically the grounds on which it is based, and to support it by affidavits.

By such extra effort the defendant frequently succeeds in ending the receivership proceeding.

Section 815. **The First Duty of the Receiver.** — When the receiver shall have duly qualified, his first duty is to take possession of the property described in the order of appointment, and render to the court an inventory thereof. Failure to perform this duty will subject the receiver to personal liability for any resulting loss.

In performing this first duty the receiver must be careful not to seize any property not included in the terms of the order of appointment; to do so would incur a personal liability.

Section 816. **The Powers of the Receiver.** — The purpose of the appointment of a receiver is for the preservation of the property, and along this line runs the measure of his powers, duties and liabilities. He is an officer of the court, its "right hand," as it has been figuratively put, and at all times subject to its control.

In determining the power of a receiver it should be considered whether he is a common-law or statutory, a temporary or permanent, or an ancillary receiver. But it is a general rule that the powers of every receiver do not extend beyond those conferred by the order of appointment, or by subsequent orders. A court, cannot, however, give to a statutory receiver any authority greater than that conferred by the statute.

In speaking of the powers of a receiver it is to be understood that reference is had to such powers as the court, in the proper exercise of its jurisdiction, confers on him. It is not every power that a court can give to its receiver. The powers may be expressed or implied.

In the performance of his duties the careful receiver will adhere closely to the authority conferred by the orders of the court. He is at all times privileged to report to the court as to any matter, and ask its advice and instruction concerning it. To act only within the spirit of the orders will insure safety to the receiver, and avoid complication.

It must be conceded, however, that in many particulars a receiver may exercise his discretion in the administration of the trust committed to him, the exercise of which is not only frequently safe and proper, but sometimes imperative. In cases of emergency, even without the order of the court, he would be expected to do whatever might be necessary for the preservation of the trust property

A receiver should not hesitate to do that which would be beneficial to the property, without authority from the court, where to delay would subject the property to danger and loss. He may depend upon the court to approve all such acts, which are always

subject to its approval or rejection. The test of the propriety and correctness of an act without authority from the court is whether it was for the benefit of the property and done in a reasonable manner.

Any act which would impose a liability on the property, unless authorized by the court, should be cautiously done; but the receiver may, in the exercise of his discretion, insure the property, make repairs, employ necessary assistance and do other like acts, with the assurance that his action will be approved by the court, when done properly and in good faith.

Section 817. **The Duties and Liability of the Receiver — His Personal Liability.** — In the second preceding section it is asserted that the first duty of the receiver is to take possession of the property described in the order, and then to prepare and file an inventory. His subsequent duties pertain to the control and preservation of the property, and he must exert every reasonable effort and exercise all proper care for such purpose.

A receiver is a trustee, and is required to exercise prudence and good faith in the administration of the trust, and to bring to the discharge of his duties the same skill and personal supervision that he would be expected to give to his own property. The measure of a receiver's liability is the exercise of ordinary care, because he is a bailee for mutual benefit.

The paramount duty of a receiver is to obey the orders of the court. He should keep the court fully informed as to the condition of the estate and as to all matters concerning it. He should, in cases of doubt, ask the advice of the court, that he may be directed by it as to what action to take.

Whenever the receiver goes beyond the authority conferred by the court, when he does that which he has not been empowered to do, he assumes a risk, and one that is personal. Such act would be subject to the approval of the court, as stated in the preceding section. So long as a receiver acts within the scope of his authority as given by the court, he incurs no personal liability.

He should keep the trust fund with ordinary care. It should not be mingled with his own money, or used for his own benefit in any particular.

Section 818. **Of the Procedure by the Receiver Before the Court** — Any matter which the receiver desires to submit to the court must be presented by written petition or statement. The record must show the transaction in full.

It is the right of the receiver to petition or inform the court at all

times concerning any matter connected with the trust; to seek its advice and ask for directions.

In many instances it is required that the petition or statement be verified by the oath of the receiver, or some one having knowledge of the facts related.

Section 819. **Of the Procedure by Third Persons Having Claims Against the Receiver or Estate.**— It is the commom practice for courts to fix a time within which all claims against the estate, that is against the person or corporation whose property the receiver possesses, are required to be presented for allowance; and the consideration of such claims is committed to a master or referee, who reports his action to the court, where it is approved or rejected. Such report is, of course, subject to objection by any creditor whose claim is rejected in whole or in part.

All claims should be presented within the time prescribed by the court; but if this be not done, it is discretionary with the court to consider any claim presented thereafter.

It is the rule that a receiver cannot be sued without leave of the court appointing him, except receivers of federal courts, the rule as to them having been abrogated by act of Congress. When one has a claim against a receiver, which is not recognized as valid, he may intervene, that is, present a petition to the court in the receivership proceeding, asking for the relief wished; or he may ask leave of the court to sue the receiver in some court.

Granting leave to sue the receiver is discretionary, and the court may grant it, or refuse the application and require the petitioner to submit his claim to it for settlement. When the latter is done the trial of questions of fact may be referred to a jury.

Section 820. **The Receiver's Compensation.** — Unless the compensation of the receiver be regulated by statute, the amount thereof is to be fixed by the court in the exercise of its discretion. The amount paid a receiver should be such as would be reasonable for the services rendered under the same circumstances by a person of ordinary ability and competency. The compensation should be reasonable, having reference to the duties and responsibility of the receiver, the time consumed in administering the trust, and the integrity, activity and dispatch with which his work was performed. The business ability required to discharge the duties of the position should also be considered.

It is customary and proper to pay a receiver for his services from time to time during the receivership, and at the time of his discharge

to take into consideration such amounts in determining the balance of his compensation.

The compensation of a receiver is part of the expense of the receivership proceeding, and is to be paid out of the trust fund.

Section 821. **Of the Receiver's Accounts.** — The receiver must keep full and accurate accounts of all his transactions, and of the money received and expended by him, and must render a statement of his stewardship to the court from time to time. It is the practice sometimes to fix certain periods when the receiver must, without further order, render a statement of the trust affairs to the court.

When expending money the receiver should always take a proper receipt, which should be tendered the court with his accounts.

The court may require the receiver to render an accounting at any time.

A full and detailed statement of receipts and expenditures is required, that the correctness of the items may be determined on the face of the statement.

Finally, when the receiver is to be discharged, after notice to all parties, he must render a final statement, which, like all his accounts, is subject to objection by any of the parties.

Section 822. **Of the Expense of the Receivership.** — It is the rule that all expenses attending a receivership proceeding are entitled to priority of payment out of the trust fund or *corpus* of the property. In some cases such expenses have been assessed against the plaintiff where he was unsuccessful in the litigation.

Section 823. **Removal and Discharge of the Receiver.** — The removal of the receiver does not imply an end of the proceeding, but his discharge does. Removal is when, because of some objection personal to the receiver, he is displaced by another, in pursuance of an order of the court. The discharge of the receiver attends the termination of the receivership proceeding.

Any party interested may petition for the removal of the receiver, which would be in the nature of a motion addressed to the sound discretion of the court. The petition or application must contain specific charges properly set forth. Vague and unsupported allegations will be of no avail.

It is within the jurisdiction of the court to remove its receiver at any time.

The discharge of a receiver is incident to the termination of the whole proceeding, and follows its end and his final accounting. It

does not result *ipso facto* from the termination of the proceeding, but requires an order of court.

When the powers and duties of the receiver are at an end, the property in his possession, after payment of all expenses, belongs to the party successful in the litigation.

The official liability of a receiver ends with the termination of his official existence.

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